(10)

No. 93-2068-CFX Title: Brett C. Kimberlin, Petitioner
Status: GRANTED v.
J. Michael Quinlan, et al.

Docketed: Court: United States Court of Appeals for
June 22, 1994 the District of Columbia Circuit

Counsel for petitioner: Rosenblatt,Howard Terrence

Counsel for respondent: Martinez,Michael, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 22 1994	G	Petition for writ of certiorari filed.
2	Jul 22 1994		Brief of respondents J. Michael Quinlan, et al. in opposition filed.
3	Jul 27 1994		DISTRIBUTED. September 26, 1994 (Page 71)
4	Aug 18 1994	X	Reply brief of petitioner filed.
5	Oct 3 1994	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Jan 4 1995		REDISTRIBUTED. January 20, 1995 (Page 1)
7	Jan 4 1995		Brief amicus curiae of United States filed.
8	Jan 20 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 1, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 29, 1995. Rule 29.2 does not apply.
			**********
15	Feb 2 1995		SET FOR ARGUMENT WEDNESDAY, APRIL 26, 1995.(2ND CASE).
11	Feb 13 1995	G	Motion of the parties to dispense with printing the joint appendix filed.
12	Feb 21 1995		Motion of the parties to dispense with printing the joint appendix GRANTED.
13	Feb 21 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit (BOX)
14	Mar 1 1995		Brief of petitioner Brett C. Kimberlin filed.
16	Mar 1 1995		Brief amici curiae of American Civil Liberties Union, et al. filed.
18	Mar 1 1995		Brief amicus curiae of United States filed.
17	Mar 2 1995		Record filed.
		*	Original record proceedings U. S. District Court for the District of Columbia (2 BOXES) (3 SEALED ENVELOPES)
19	Mar 3 1995		CIRCULATED.
20	Mar 16 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Mar 24 1995		Response by respondents to motion of the Solicitor General for leave to participate in oral argument as amcius curiae and for divided argument filed.
23	Mar 28 1995	X	Brief amici curiae of Hawaii, et al. filed.
22	Mar 29 1995	X	Brief of respondents J. Michael Quinlan, et al. filed.
24	Apr 3 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

No. 93-2068-CFX

Entry	Date	Note	Proceedings and Orders
			argument GRANTED.
25	Apr 19 1995	X	Reply brief of petitioner filed.
26	Apr 26 1995		ARGUED.

Supreme Court, U.S.
FILED
93 2068 JUN 22 1994
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT*
ALAN N. HARRIS
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

*Counsel of Record

Attorneys for Petitioner

106 pp

QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity? The court below imposed a "heightened pleading standard," in conflict with decisions of the First and Seventh Circuits and contrary to this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct," as opposed to persuasive circumstantial evidence of unlawful motive? The court below imposed a direct evidence requirement, in conflict with decisions of the Sixth, Seventh and Ninth Circuits.

PARTIES TO THE PROCEEDINGS

The following parties were defendants in the district court: J. Michael Quinlan, Loye W. Miller, Jr. and the United States of America. The sole plaintiff was petitioner, Brett C. Kimberlin. Only respondents Quinlan and Miller were appellants in the court of appeals. Claims against the United States remain pending in the district court.

TABLE OF CONTENTS

Questions Presented i

Parties To The Proceedings ii

Table Of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provision And Federal Rules Involved 2

Introduction And Statement Of The Case 2

Reasons For Granting The Petition 11

Review Is Necessary To Resolve A Conflict Among The Circuits, And Between The Federal Courts And State Courts Of Last Resort, Concerning The Proper Standard For Assessing Qualified Immunity 11

A. The Ruling Below Conflicts With Three Other Courts Of Appeals On Whether *Bivens* Plaintiffs Are Required To Produce "Direct" Evidence Of Intent At The Pre-Discovery Stage 12

B. The Ruling Below Conflicts With This Court's Holdings That Circumstantial Evidence Is Not Intrinsically Different From Direct Evidence 13

C. The Ruling Below Conflicts With Decisions of Two Other Circuits Holding That Heightened Pleading Standards Do Not Apply To *Bivens* And Section 1983 Cases That Turn On Motive 16

D. Review Is Warranted To Resolve A Conflict Between Federal Courts Of Appeals And State Courts Of Last Resort 18

Conclusion 19

Appendix A 1a

Appendix B 44a

Appendix C 64a

Appendix D 76a

TABLE OF AUTHORITIES

CASES

Batiste v. Colonial Sugars, Inc., No. 92-3513 1993 U.S. Dist. LEXIS 6038 (E.D. La. May 5, 1993) 17

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Black v. Lane, No. 92-3627, 1994 U.S. App. LEXIS 8939 (7th Cir. Apr. 26, 1994) 17

Bombliss v. County of Lee, No. 93-1220, 1994 U.S. App. LEXIS 6935 (7th Cir. Apr. 6, 1994) 17

Branch v. Tunnell, 937 F.2d 1382 (1991), *appeal after remand*, *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), *cert. denied* (June 20, 1994) (No. 93-1327) 13, 18

Butz v. Economou, 438 U.S. 478 (1978) 2, 11

Callaghan v. Congemi, No. 91-1496 1993 U.S. Dist LEXIS 4819 (E.D. La. Apr. 8, 1993) 17

Carlson v. Green, 446 U.S. 14 (1980) 2

Conley v. Gibson, 355 U.S. 41 (1957) 12

Crutcher v. Kentucky, 883 F.2d 502 (6th Cir. 1989) 13

Dodson v. City of Kenner, No. 92-3530:E/6 1993 U.S. Dist. LEXIS 6077 (E.D. La. May 5 1993) 17

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992) 12

Farmer v. Brennan, No. 92-7247, 1994 U.S. LEXIS 4274 (June 6, 1994) 15

Fulwood v. Porter, 639 A.2d 594 (D.C. 1994) 18

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 11, 15

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 14

Holland v. United States, 348 U.S. 121 (1954) 13

Leatherman v. Tarrant County, Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) ..... *passim*

Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 15

Lubcke v. Boise City/Ada County Housing Authority, 860 P.2d 653 (Idaho 1993) 19

McCallen v. Holland-Hull, No. 93-3415 1994 U.S. Dist. LEXIS 1364 (E.D. Pa. Jan. 27, 1994) 17

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960) 14

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 8, 11

Mohid v. Wheatley, No. 3:92-CV-2284-H 1993 U.S. Dist. LEXIS 5285 (N.D. Texas Apr. 20, 1993) 17

Oropallo v. Parrish, No. 93-1953 1994 U.S. App. LEXIS 9748 (1st Cir. May 5, 1994) 16

Point Properties, Inc. v. Anderson, 584 So.2d 1332 (Ala. 1991) 19

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957) 14

Sapp v. Cunningham, No. 93-CV-0222-B 1994 U.S. Dist. LEXIS 3707 (D.Wyo. Mar. 23, 1994) 17

Sawyer v. County of Creek, 908 F.2d 663 (10th Cir. 1990) 18

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 5, 11

Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991) 5, 7

Tuite v. Henry, No. 93 C 3248 1994 U.S. Dist. LEXIS 1845 (N.D. Ill. Feb. 11, 1994) 17

Wilson v. Seiter, 501 U.S. 294 (1991) 15

Wyatt v. Cole, 112 S. Ct. 1827 (1992) 15

CONSTITUTION, STATUTES AND RULES OF PROCEDURE

U.S. Const. Amend. I ..... *passim*
U.S. Const. Amend. V 4, 15
U.S. Const. Amend. VIII 15
U.S. Const. Amend. XIV 15

18 U.S.C. § 2511 4
28 U.S.C. § 2671 4

Fed. R. App. P. 35(a) 10
Fed. R. Civ. P. 8 16
Fed. R. Civ. P. 9(b) 16
Fed. R. Civ. P. 56 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No.

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and

LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brett C. Kimberlin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a - 43a) is reported at 6 F.3d 789. The concurring and dissenting opinions on petitioner's suggestion for rehearing *en banc* are reported at 17 F.3d 1525. App., *infra*, 65a- 76a. The opinion of the district court (App., *infra*, 44a - 64a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A timely petition for rehearing was denied

on April 1, 1994. App., *infra*, 65a-76a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rules 8(a), 9(b) and 56 of the Federal Rules of Civil Procedure are set forth at App., *infra*, 77a-79a.

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from admittedly unprecedented actions by federal officials that silenced and punished a citizen who claimed to have potentially damaging information about a candidate for high public office. That deprivation of petitioner's First Amendment rights provides the context for this Court to address the important and unsettled question of how to balance two indispensable constitutional interests: the ability of victims of constitutional violations to seek vindication in court and to deter future violations, and the ability of government officials to perform their functions without undue concern about potential litigation. In conflict with other courts of appeals, the District of Columbia Circuit has imposed a "heightened pleading standard" in Section 1983 and *Bivens* cases where unlawful motive is an element.[1]

---

[1] The same standards of qualified immunity apply to *Bivens* and Section 1983 cases. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression" (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

Although the district court held that petitioner satisfactorily showed "tangible," "concrete" and "persuasive" evidence of unlawful intent (App., *infra*, 53a), the court of appeals held that, prior to any discovery, a plaintiff must submit "direct" evidence of intent. *Id.* at 12a-13a. In reversing, the court of appeals determined that anything short of a voluntary confession of wrongdoing by the defendant results in dismissal of an otherwise meritorious *Bivens* action prior to discovery. Because state of mind is generally provable only through circumstantial evidence, the ruling below effectively prohibits an entire class of *Bivens* and Section 1983 claims.

So nettlesome are these issues that six members of the District of Columbia Circuit expressly commented on the importance of and need for Supreme Court review in this case. App., *infra*, 66a, 68a, 76a. That extraordinary endorsement is well-founded: The decision below squarely conflicts with the holdings of other courts of appeals on two important and recurring issues concerning the scope of qualified immunity; it is contrary to the underpinnings of this Court's holding prohibiting judge-made "heightened pleading standards" in a related context; it imposes a standard with which five Justices of the Supreme Court have disagreed; and it conflicts with the well-established principle that circumstantial evidence is not intrinsically different from direct evidence. In short, this case is a nonpareil candidate for review.

1. Background. This case involves governmental infringement of the most basic First Amendment rights of "[a] citizen of the United States [who] suggested to the media that he had damaging information about the candidate for the second-highest executive position in our democracy." App., *infra*, 43a. Days before the 1988 presidential election, high-ranking federal officials, under pressure from political campaign workers, locked the petitioner into "'administrative detention,' where he was effectively precluded from sharing his story with an understandably curious media." *Id.*

On November 4, 1988, the Director of the United States Bureau of Prisons, respondent J. Michael Quinlan, learned

that a prison warden in Oklahoma had scheduled, pursuant to applicable regulations, a "group interview" for that evening to accommodate requests from news organizations to interview petitioner Brett Kimberlin, a prison inmate. App., *infra*, 45a. The reporters sought to interview petitioner about allegations that in the early 1970's he had sold marijuana to the 1988 Republican candidate for vice president. *Id.* at 44a. Upon learning of this development, a senior official of the Bush-Quayle Campaign complained to respondent Loye Miller, a senior Justice Department official, who, in turn, repeatedly contacted Director Quinlan's office. *Id.* at 27a, 55a. Quinlan thereupon personally ordered the group interview canceled and petitioner locked into "administrative detention." *Id.* at 54a.

Prison officials released petitioner from confinement over the weekend before the November 8 election, only to learn, from monitoring his telephone calls, that he planned to relate his story to a group of reporters on Monday, the day before the election. App., *infra*, at 55a. Again, petitioner was locked into detention before he could speak to the reporters, and he was held there until a week after the election. *Id.*

Petitioner filed this *Bivens* action alleging intentional violations of his First Amendment rights against former senior Justice Department officials Quinlan and Miller.[2] Respondents moved to dismiss the complaint or, alternatively, for summary judgment based on an assertion of qualified immunity. In accordance with the procedure for motions involving claims of qualified immunity, the district court stayed all discovery relating exclusively to the *Bivens*

---

2 *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint also asserts claims under the Federal Tort Claims Act, 28 U.S.C. § 2671, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511, and the Fifth Amendment. The district court dismissed the Fifth Amendment claim as duplicative of the First Amendment claim, and a portion of the tort claim on grounds of venue. These other claims are not subjects of this petition.

claim and prohibited the taking of respondents' depositions.[3]

Respondents contended that they were entitled to immunity because petitioner allegedly failed to satisfy the "heightened pleading standard" the District of Columbia Circuit created in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), which requires a plaintiff to submit, prior to discovery, "direct as opposed to merely circumstantial evidence of the intent."

In opposition, petitioner submitted numerous internal government documents, affidavits and other evidence that established respondents' unlawful intent in at least four ways: (1) by showing that respondents' proffered explanations for the confinements were false and contradicted by objective evidence; (2) by showing that respondents' explanations for their actions were repeatedly revised; (3) by showing that respondents were improperly influenced by at least one senior official of the 1988 Bush-Quayle campaign; and (4) by showing that, just before the detentions, respondents barred petitioner from meeting with reporters because of the content of his speech.

For example, petitioner's submissions showed that respondent Quinlan offered a pretextual explanation for the confinement to his superiors and to members of Congress, *viz.*, that a reporter expressed fear for petitioner's safety. App., *infra*, 54a. Yet, the reporter affirmed in a sworn affidavit that she "had never said any such thing." *Id.*

Additional evidence showed that respondent's explanation was pretextual:

> 1. Never before had a Director of the Bureau of Prisons ordered an individual inmate into detention for any reason, let alone to protect the inmate's "safety," a determination historically left to local officials. App., *infra*, 54a.

---

3 *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed.")

2. Respondent Quinlan's order followed on the heels of heated telephone calls to respondent Miller from a senior campaign official, who exclaimed that he was "bowled over" and "amazed" that petitioner would be allowed to relay his story to the media. App., *infra*, 27a. Respondent Miller, in turn, was in constant communication with the Director's office. *Id.* at 24a-27a, 55a.

3. Once confined, petitioner was subjected to a standing order prohibiting his use of the telephone, which not only was inconsistent with a stated effort to protect his safety, but also violated Bureau regulations. App., *infra*, 24a.

4. The supposed effort to protect petitioner's "safety" was implemented by officials who wrestled petitioner from his room, placed him in handcuffs, "wheelbarrow marched" him to detention in a painful, hunched-over position, denied him adequate clothing, and conducted a strip search, all of which, as the district court found, were "inconsistent with administrative segregation as a protection for his own safety." App., *infra*, 23a, 55a.

5. The Bureau subsequently conceded that there was no threat to petitioner's safety. App., *infra*, 6a.

Petitioner also submitted evidence showing that respondent Quinlan canceled the scheduled group interview on November 4 because of the content of petitioner's speech.[4] App., *infra*, 27a-28a, 54a-55a.

With respect to the confinement on the day before the election, pre-discovery submissions established that

---

[4] For example, the explanation Quinlan offered for cancelling the group interview -- that Bureau "policy" prohibits such interviews -- is "entirely suspect." App., *infra*, 27a. Bureau regulations authorize wardens to regulate the number of press personnel entering the institution and it was the local prison officials who initially suggested the procedure. App., *infra*, 28a. Moreover, reporters "were told that the press conference was cancelled due to `unfor[e]seen circumstances,'" not because it allegedly violated Bureau regulations. *Id.*

respondent Quinlan gave this order to prohibit petitioner from speaking with reporters. Contrary to pretextual justifications offered at the time, the Bureau of Prisons has acknowledged that petitioner was confined to keep him from speaking with the gathered reporters on the morning before the election:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. *As a result*, Mr. Kimberlin was again placed in administrative detention.

App., *infra*, 26a (emphasis added), quoting Bureau of Prisons Administrative Decision. Respondent Miller made the same admission. *Id.* at 26a, 56a. As the district court found, respondent Quinlan had been closely monitoring communications with the press and this "detention, like the previous one, was also ordered personally by Director Quinlan."[5] *Id.* at 55a.

2. The district court decision. In denying respondents' motion for qualified immunity, the district court held that petitioner satisfied the "heightened pleading" standard by supporting his allegations of unlawful intent with facts and evidence that were "nonconclusory," "tangible," and "concrete." App., *infra*, 53a.

The district court analyzed the record in light of the "heightened pleading standard" articulated by the District of Columbia Circuit in *Siegert v. Gilley*. In *Siegert*, the court of appeals ruled that in cases in which motive is an element of the alleged offense, *Bivens* and Section 1983 plaintiffs must present "direct evidence" of intent, and that circumstantial or inferential evidence is inadequate to survive a defense of qualified immunity. 895 F.2d at 798.

---

5 Substantial additional evidence of respondents' unlawful motive is summarized in the district court's opinion and in the majority and dissenting opinions of the court of appeals. App., *infra*, 3a-7a, 21a-29a, 54a-56a.

The district court reasoned that *Siegert* did not depart from this Court's precedent establishing that direct evidence is no better, and is often less reliable, than circumstantial evidence. App., *infra*, 52a. The court also noted the inherent impracticality of producing "direct evidence" of intent in any circumstances, let alone prior to discovery, and held: "it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness." *Id.* at 52a n.9. In this regard, the district court observed that its analysis was consistent with the view expressed in the Solicitor General's brief to this Court in *Siegert*. *Id.*

On the extensive evidentiary showing in this case, the district court found that petitioner's pre-discovery submissions "tend to show, circumstantially yet in tangible and persuasive fashion, that the defendants had the intent or motive requisite for a *Bivens* action."[6] *Id.* at 53a.

3. The court of appeals decision. On respondents' interlocutory appeal,[7] a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed and dismissed petitioner's *Bivens* claim. The panel produced three separate opinions. The majority opinion written by Judge Henderson held that the "heightened pleading standard" enunciated in *Siegert* requires *Bivens* and Section 1983 plaintiffs to produce, prior to discovery, "*direct* evidence" of unconstitutional motive. App., *infra*, 12a - 13a. (emphasis in original). The majority concluded that this action must be dismissed at the outset because petitioner's pre-discovery submissions constituted "mere" circumstantial or inferential evidence of respondents' unlawful efforts to silence him. *Id.*

---

6 Respondents also argued that petitioner did not allege violations of law that were "clearly established" at the time of the injury. App., *infra*, 47a - 49a. The district court rejected this contention because it was well established at the time of the injury that prison inmates may not be punished or censored because of the content of their speech. *Id.* at 47a-48a. On appeal, respondents abandoned their contention that the rights claimed to have been violated were not clearly established.

7 *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

In a separate concurring opinion, Judge Williams expressly criticized the "direct evidence" pleading rule imposed by circuit precedent. Recognizing that "the requirement would be fatal except in the rare case of the defendant's confession," Judge Williams observed that it "appears completely arbitrary and unrelated to the strength of the plaintiff's case." App., *infra*, 18a. Judge Williams also found it "hardly surprising that the only circuits to consider [the District of Columbia Circuit's] direct evidence rule have rejected it." *Id.*

In dissent, Judge Edwards stressed that the circuit's heightened pleading standard will "prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances." App., *infra*, 41a. He also noted this Court's holding that "heightened pleading" standards in civil rights actions alleging municipal liability impermissibly conflict with the Federal Rules of Civil Procedure. *Id.* at 20a. *See Leatherman v. Tarrant County, Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993). While acknowledging that *Leatherman* expressly reserved the question whether a heightened pleading standard is permissible in cases alleging individual liability, Judge Edwards reasoned that the basis for the holding "casts doubt on the validity of *any* judge-made 'heightened pleading' standard imposed in *any* context." App., *infra*, 20a (emphasis in original).

Even if a "heightened pleading" standard were permissible, Judge Edwards continued, the requirement of "direct evidence" of intent has "no foundation in reason or in the case law." App., *infra*, 21a. In this case, Judge Edwards found that petitioner had presented "powerful circumstantial evidence" that "overwhelmingly supports an inference that the defendants acted with unconstitutional motive." *Id.* at 28a, 39a. He concluded (*id.* at 43a):

> While we might expect such official action not to raise eyebrows in a country with fewer guarantees of civil liberty, such action is unfathomable in this country under our constitutional system of government. I simply cannot imagine that the judiciary of

> the United States will shut the doors of the courthouse and refuse to allow Kimberlin's suit to proceed for the specious reason that his complaint is based on circumstantial evidence.

4. Opinions accompanying denial of rehearing *en banc*. The petition for rehearing and suggestion for rehearing *en banc* was denied, although more active members of the court favored rehearing than opposed it.[8] And *six* judges either wrote or joined in opinions expressing the clear need for this Court to review the decision below.

Judge Silberman, concurring in the denial of *en banc* review, acknowledged that "[t]hose who criticize this circuit's direct versus circumstantial evidence distinction . . . have a logical point." App., *infra*, 68a (citation omitted). Nevertheless, Judge Silberman opposed rehearing *en banc* on the ground that "the Supreme Court is better positioned than we to resolve the broader problem." *Id.*

Judge Williams, joined by Judges Buckley and Silberman in concurrence, similarly acknowledged that "[t]he imperfections of [this circuit's] 'direct evidence' rule are plain to see" (App., *infra*, 66a), but concluded that "it seems to me on balance preferable to continue with the imperfections of *Siegert* until the Supreme Court resolves the issue." *Id.* at 67a - 68a.

Writing in dissent, Judge Edwards, joined by Chief Judge Mikva and Judge Wald, described the circuit's pleading standard as "Kafkaesque." App., *infra*, 70a. He explained that the panel decision conflicts with this Court's rationale in *Leatherman*, squarely conflicts with the three

---

[8] Five of the court's ten active judges voted in favor of rehearing the case *en banc* and four voted against. App., *infra*, 70a. Judge Rogers, who joined the court on March 11, 1994, did not participate in the decision. *Id.* at 66a. Under the Federal Rules of Appellate Procedure and D.C. Circuit internal procedures, a suggestion for rehearing *en banc* is denied unless favored by a majority of judges in active service at the time of the vote. Fed. R. App. P. 35(a); United States Court of Appeals for the District of Columbia Circuit Handbook of Practice and Internal Procedures ¶ XIII B.2. (1994).

other circuits that have considered and rejected the "direct evidence" rule, and is supported by "neither logic nor law." *Id.* at 73a. Judge Edwards cautioned that the panel's decision will "deny[] relief to a whole class of claims, apparently only on the basis of the plurality's conviction that the Supreme Court has gone too far in permitting them." *Id.* at 75a. He concluded with the "hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit." *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS, AND BETWEEN THE FEDERAL COURTS AND STATE COURTS OF LAST RESORT, CONCERNING THE PROPER STANDARD FOR ASSESSING QUALIFIED IMMUNITY

This Court has often noted the importance of reviewing cases that present unresolved questions of qualified immunity.[9] The decision below squarely conflicts with the holdings of three other courts of appeals, which have considered and rejected the District of Columbia Circuit's "direct evidence" pleading standard (and five Justices of this Court have expressed similar views). It also conflicts with the logic of this Court's decision, and with the holdings of two courts of appeals, that "heightened pleading" standards violate the Federal Rules of Civil Procedure.

If the decision below is permitted to stand, any *Bivens* or Section 1983 case that turns on unlawful motive will be dismissed unless the plaintiff somehow unearths a confession of wrongdoing without the benefit of discovery. Citizens whose civil and constitutional rights are thus violated stand in jeopardy of losing vital protection afforded

---

[9] *See, e.g., Butz v. Economou*, 438 U.S. 478, 480-481 (1978) ("Because of the importance of immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari"). *See also Siegert*, 111 S. Ct. at 1793 ("We granted certiorari . . . in order to clarify the analytical structure under which a claim of qualified immunity should be addressed"); *Mitchell v. Forsyth*, 472 U.S. at 519; *Harlow v. Fitzgerald*, 457 U.S. at 801.

by *Bivens* and Section 1983 actions. Equally important, assertions of qualified immunity by public officials in different parts of the country will be subject to different standards.

The extraordinary endorsement of certiorari by six members of the District of Columbia Circuit attests to the need for this Court's review. The petition should be granted in order to restore uniformity and certainty to the important balance between the constitutional rights of individuals and the effective functioning of government.

A. The Ruling Below Conflicts With Three Other Courts Of Appeals On Whether *Bivens* Plaintiffs Are Required To Produce "Direct" Evidence Of Intent At The Pre-Discovery Stage

In conflict with the decision below, three federal courts of appeals have considered and rejected the District of Columbia Circuit's rule requiring *Bivens* and Section 1983 plaintiffs to present "direct evidence" of intent to survive dismissal on grounds of qualified immunity. The Sixth, Seventh and Ninth Circuits have expressly held that circumstantial evidence is sufficient.[10]

The Seventh Circuit has explicitly rejected the direct evidence requirement the District of Columbia Circuit created in *Siegert*: "Although the court of appeals' opinion in *Siegert* insisted . . . that the plaintiff produce 'direct' evidence of the defendant's improper intent, we agree with Justice Kennedy ['s concurring opinion in *Siegert*] that there is no principled difference between direct and circumstantial evidence." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1242 (1992). The unanimous panel observed: "Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Id.*

---

[10] Contrary to the District of Columbia Circuit's rule requiring *Bivens* plaintiffs to submit "direct evidence," the Federal Rules of Civil Procedure require that all facts must be viewed in the light most favorable to the non-moving party. *See Leatherman*, 113 S. Ct. at 1161; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Ninth Circuit also has flatly stated that "[w]e disagree . . . with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial, evidence." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (1991), *appeal after remand*, 14 F.3d 449 (9th Cir. 1994), *cert. denied* (June 20, 1994) No. 93-1327.[11] Finally, the Sixth Circuit rejected a "direct evidence" rule in *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989). The court held that plaintiff may rely on proof "that would be strong enough to allow a jury to return a verdict for her under appropriate instructions," and stated: "it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof."

The District of Columbia Circuit's stated resolve to apply its admittedly flawed "direct evidence" rule until this Court adjudicates the issue shows that this Court's intervention is needed to provide uniformity among the courts of appeals on an important and recurring issue.

B. The Ruling Below Conflicts With This Court's Holdings That Circumstantial Evidence Is Not Intrinsically Different From Direct Evidence

By erecting a pleading standard that requires *Bivens* plaintiffs to submit "direct evidence" of intent, the decision below also conflicts with this Court's holdings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). In some instances, circumstantial evidence

---

11 In contrast to the present case, the Solicitor General noted in his brief in opposition in *Branch v. Tunnell* that the complaint "failed to state a claim even in the absence of a heightened pleading standard." *Brief for the Respondent in Opposition*, No. 93-1327, at 11. Moreover, the petitioner in *Branch* "failed to identify any respect in which a lower pleading standard would have affected the outcome of this case." *Id.* at 9. In the present case, however, the Justice Department acknowledged before the court of appeals: "If plaintiff's standard of pleading and proof is applied to this case, we agree that summary judgment was properly denied." *Reply Brief for Appellants* (D.C. Cir., No. 91-5315), at 2. Thus, the judgment in this case turns on two important issues absent in *Branch*: whether a heightened pleading standard is permissible, and, if so, whether the direct evidence standard applied by the court of appeals is the proper standard.

"may also be 'more certain, satisfying and persuasive than direct evidence.'" *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)). Requiring "direct evidence," moreover, is particularly inappropriate where, as here, state of mind is at issue. As this Court has explained with respect to cases of fraud:

> [P]roof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.

Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

In *Siegert*, the four justices who addressed the District of Columbia Circuit's direct evidence pleading rule flatly rejected it. Justice Kennedy wrote in concurrence that: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the [D.C. Circuit] Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." 111 S. Ct. 1789, 1795. Similarly, Justice Marshall, joined by Justice Stevens and Justice Blackmun, perceived that the District of Columbia Circuit's direct evidence rule "effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim" and that there is "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 1801 (Marshall, J., dissenting). (The majority did not reach this issue in *Siegert*.)

In a more recent concurring opinion, Justice Kennedy, joined by Justice Scalia, recognized that circumstantial evidence may overcome a claim of qualified immunity:

> [T]he question [of qualified immunity] may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case.

Wyatt v. Cole, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring).

The court below dismissed this action simply because the petitioner's compelling and persuasive evidence was circumstantial. The rule of decision in this case threatens to undermine this Court's decision in *Bivens* by effectively converting an official's qualified immunity into absolute immunity, thus precluding vindication of clearly established constitutional rights for reasons that are entirely irrelevant to the merits of a claim. That result is contrary to this Court's recognition that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *See Bivens*, 403 U.S. at 410. The extreme standard of pleading and proof applied in this case is all the more unwarranted in light of the plain deprivation of valued First Amendment protections.[12]

---

12 The issue takes on even greater urgency because motive is often an essential element of violations of the due process guarantees of the Fifth Amendment, equal protection guarantees of the Fourteenth Amendment and the prohibition against cruel and unusual punishment of the Eighth Amendment. *See, e.g., Farmer v. Brennan*, 62 U.S.L.W. 4446, 4448 (June 6, 1994) ("To violate the Cruel and Unusual Punishment Clause, a prison official must have a `sufficiently culpable state of mind,'" *quoting Wilson v. Seiter*, 501 U.S. 294, 297 (1991)); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (defendant's intent is an essential element of a claim of sexual harassment brought under the Fifth Amendment).

C. The Ruling Below Conflicts With Decisions of Two Other Circuits Holding That Heightened Pleading Standards Do Not Apply To *Bivens* And Section 1983 Cases That Turn On Motive

In *Leatherman*, this Court unanimously held that heightened pleading standards are impermissible in civil rights actions against municipalities. 113 S. Ct. at 1161-63. The Court explained that: "it is impossible to square the heightened pleading standard . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163. The holding in *Leatherman* rests on the plain language of the Federal Rules, which does not create distinctions based on the subject matter of the case or the identity of the defendant.

Although the Court reserved the question of pleading standards for claims against individual officials (*id.* at 1162), the same Federal Rules that governed municipal liability in *Leatherman* apply with equal force to *Bivens* cases. As Justice Kennedy observed with respect to the District of Columbia Circuit's pleading rule in *Siegert*: "The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring).

In conflict with the decision below, two courts of appeals have relied on *Leatherman* in applying the notice pleading provisions of Rule 8 to civil rights actions alleging individual liability. The First Circuit recently cited *Leatherman* in assessing the adequacy of a Section 1983 complaint alleging that prison officials had fabricated disciplinary charges against a plaintiff inmate: "The standard for assessing the adequacy of a civil rights claim is whether, accepting the factual allegations in the complaint as true, and construing these facts in the light most favorable to the plaintiff, the pleading shows any fact which could entitle the plaintiff to relief." *Oropallo v. Parrish*, No. 93-1953, 1994 U.S. App. LEXIS 9748, at *8 (1st Cir. May 5, 1994). Similarly, the Seventh Circuit, in a Section 1983 action

against individual defendants alleging racial discrimination, held:

> Under the Supreme Court's recent holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L.Ed. 2d 517, 113 S.Ct. 1160, 1163 (1993), however, a heightened pleading rule does not apply to § 1983 claims. Rather, Rule 8 of the Federal Rules of Civil Procedure is applicable.

Black v. Lane, No. 92-3627, 1994 U.S. App. LEXIS 8939, at *11-12 (7th Cir. Apr. 26, 1994). *See also Bombliss v. County of Lee*, No. 93-1220, 1994 U.S. App. LEXIS 6935, at *8-9 (7th Cir. Apr. 6, 1994) (citing *Leatherman* in Section 1983 action, alleging that defendants "conspired to maliciously prosecute [plaintiff]," for the proposition that "the federal notice pleading rule requires a complaint to include only 'a short and plain statement' of the claim showing that the pleader is entitled to relief").[13]

---

[13] In addition, numerous district courts have concluded that the rationale of *Leatherman* precludes a heightened pleading standard in *Bivens* and Section 1983 actions against individual government officials. *See Tuite v. Henry*, No. 93 C 3248, 1994 U.S. Dist. LEXIS 1845, at *8-9 (N.D. Ill. Feb. 11, 1994) ("Just as the Federal Rules do not create an exception from Rule 8 for allegations of municipal civil rights liability, it seems consistent to conclude that they do not create such an exception for suits against individual government officials"); *McCallen v. Holland-Hull*, No. 93-3415, 1994 U.S. Dist. LEXIS 1364, at *3 (E.D. Pa. Jan. 27, 1994) ("the Court's analysis [in *Leatherman*], one of basic statutory construction, applies with equal force in § 1983 cases against individual defendants"); *Batiste v. Colonial Sugars, Inc.*, No. 92-3513, 1993 U.S. Dist. LEXIS 6038, at *5 (E.D. La. May 5, 1993) ("There is no logical reason to limit *Leatherman's* holding to claims for municipal liability, as the same Federal Rules of Civil Procedure govern all claims arising under § 1983); *Dodson v. City of Kenner*, No. 92-3530:E/6, 1993 U.S. Dist. LEXIS 6077, at *2 (E.D. La. May 5, 1993) ("Just as Chief Justice Rehnquist noted that Rule 9(b) makes no mention of municipal liability, this Court notes that the rule fails to mention claims against individual government officials"); *Mohid v. Wheatley*, No. 3:92-CV-2284-H, 1993 U.S. Dist. LEXIS 5285, at *8 (N.D. Tex. Apr. 20, 1993) ("Although the Supreme Court expressly refused to consider cases such as this one involving liability of an individual government official . . . its reasoning extends to the circumstances of this case" (citation omitted)); *Callaghan v. Congemi*, No. 91-1496, 1993 U.S. Dist LEXIS 4819, at *17 (E.D. La. Apr. 8, 1993) ("The Supreme Court's reasoning in *Leatherman* . . . appears to sound the death knell for [the] requirement of heightened pleading in suits involving individual government officials" (citation omitted)); *Sapp v. Cunningham*, No. 93-CV-0222-B 1994, U.S. Dist. LEXIS 3707, at *18 n.9 (D.Wyo. Mar. 23, 1994)

The court below, however, held that notwithstanding *Leatherman* it would continue to require *Bivens* and Section 1983 plaintiffs to satisfy its self-created "heightened pleading standard." As the majority wrote: "because the Court [in *Leatherman*] did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit." App., *infra*, 9a n.9. The Ninth Circuit, which had "[f]ollow[ed] the lead of the District of Columbia Circuit" in adopting a heightened pleading standard, has also held that *Leatherman* does not occasion a reassessment of circuit precedent because "the Court cordoned off the question whether a heightened pleading standard might be justified in an action against an individual officer." *Branch*, 14 F.3d at 452, 456. Review by this Court is necessary to resolve this split between the First and Seventh Circuits, on the one hand, and the Ninth and District of Columbia Circuits, on the other, concerning the permissibility of "heightened pleading standards" in *Bivens* and Section 1983 cases alleging individual liability.

D. Review Is Warranted To Resolve A Conflict Between Federal Courts Of Appeals And State Courts Of Last Resort

The decision below also conflicts with the holdings of the highest courts in several states on the question whether a heightened pleading standard is permissible in cases involving qualified immunity issues. Contrary to the decision below, the District of Columbia Court of Appeals recently observed that "the Supreme Court has thrown a cloud over the continued viability of [the heightened pleading standard] even as applied to the qualified immunity defense." *Fulwood v. Porter*, 639 A.2d 594, 597 (D.C. 1994). The disagreement between the District of Columbia Circuit and the District of Columbia Court of Appeals underscores the practical dilemma created by the decision below and emphatically reinforces the need for

---

("*Leatherman* effectively overrules this aspect of *Sawyer v. County of Creek*, 908 F.2d 663, 665-67 (10th Cir. 1990), where the Tenth Circuit endorsed a heightened pleading requirement").

review. The constitutional rights of citizens and the immunities of government officials in the District of Columbia are subject to different standards depending upon the forum in which a lawsuit is filed.

The conflict is by no means limited to the District of Columbia. The highest courts in other states have applied a variety of standards for resolving claims of qualified immunity that conflict with the decision below. *See Lubcke v. Boise City/Ada County Hous. Auth.*, 860 P.2d 653, 667 (Idaho 1993) (holding that the presence of material issues of fact "preclude[s] the court from ruling on the qualified immunity question" and that such a material issue would be present in "cases where clearly settled constitutional rights were violated if the plaintiff's testimony is believed but were not if the defendant's testimony is believed"); *Point Properties, Inc. v. Anderson*, 584 So.2d 1332, 1340 (Ala. 1991) (holding that evidence that city council members "were motivated" by improper goals must be viewed "in the light most favorable to [the Section 1983 plaintiff]"). These decisions of highest state courts demonstrate the clear national scope of a conflict that requires this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT*
ALAN N. HARRIS
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

*Counsel of Record
Attorneys for Petitioner

June 22, 1994

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 16, 1992
Decided October 8, 1993

No. 91-5315

BRETT C. KIMBERLIN,
Appellee,

v.

MICHAEL J. QUINLAN, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 90-01549)

Robert M. Loeb, Attorney, U.S. Dept. of Justice, Assistant United States Attorney, argued the cause for the appellants. On brief were *Jay B. Stephens*, United States Attorney at the time the briefs were filed, *Stuart M. Gerson*, Assistant Attorney General, and *Barbara L. Herwig*, Assistant United States Attorney.

Howard T. Rosenblatt argued the cause for the appellee.

Jane E. Kirtley filed the brief for amicus curiae Reporters Committee for Freedom of the Press.

David H. Remes and *Arthur B. Spitzer* filed the brief for amicus curiae American Civil Liberties Union of the National Capital Area.

Before EDWARDS, WILLIAMS and HENDERSON, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

Separate concurring opinion filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* EDWARDS.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Brett C. Kimberlin, a federal prisoner, brought this action against J. Michael Quinlan, Director of the Bureau of Prisons (Bureau), Loye W. Miller, Jr., Director of Public Affairs at the Department of Justice (Department), and the United States. The complaint alleged Quinlan and Miller, in their individual capacities, conspired to violate and in fact violated Kimberlin's rights under the first and fifth amendments to the United States Constitution by denying him, respectively, access to the press and due process of law. In addition, the complaint charged the United States and Quinlan in his official capacity with the torts of assault and battery and with violating title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511. The district court dismissed the tort claims in part[1] and the fifth amendment claims *in toto* but left intact the first amendment and title III claims. *See Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991). Quinlan and Miller now appeal the district court's denial of their motions for dismissal or summary judgment on the first amendment claims, alleging they are entitled to qualified immunity from liability on those

---

1 Kimberlin alleged claims of assault, battery and false imprisonment. The district court dismissed the first two, but not the third, for improper venue.

claims.[2] For the following reasons we conclude the appellants are entitled to qualified immunity and, accordingly, reverse the district court's decision and remand with direction to enter summary judgment in their favor on the first amendment claims.

The circumstances giving rise to Kimberlin's claims are largely undisputed. Sometime before the November 8, 1988 presidential election, while incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma,[3] Kimberlin announced to members of the news media that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. On November 3, the Thursday before the election, NBC News contacted El Reno authorities and requested an interview with Kimberlin. The Bureau's Central Office in Washington, under pressure from NBC News, directed that the interview be expedited in order to occur before the election. Accordingly, the interview was conducted on Friday November 4.[4] On either Thursday or Friday, an official at the Bush/Quayle Campaign, having learned of the situation from other sources, telephoned the Bureau "for additional information" and was informed of the interview. Memorandum from Quinlan to Francis A. Keating, II, Associate Attorney General (Keating Memorandum) at 4.[5]

---

2 Denial of a summary judgment motion based on qualified immunity is immediately reviewable by interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

3 Kimberlin is serving a fifty-one year sentence for drug- and explosives-related charges.

4 NBC News ultimately declined to broadcast the story.

5 The exact date of the call is unclear as Quinlan placed it on "Friday, November 3rd," misidentifying either the day of the week or the date. Keating Memorandum at 4.

Other interview requests followed and, according to Carolyn A. Sabol, Regional Counsel for the Bureau's South Central Regional Office, "the Acting Warden suggested that a joint interview be set up to reduce the strain on institution resources of handling each interview separately." June 19, 1990 Letter from Sabol to Howard T. Rosenblatt, Counsel for Brett C. Kimberlin (Sabol Letter). Accordingly, R.C. Benefiel, executive assistant to the El Reno warden, told Kimberlin that "he would set up a 'press conference' for that evening at 7:00." Oct. 30, 1990 Declaration of Brett C. Kimberlin (Kimberlin Declaration) at 2. Mark Goodin, Deputy Press Secretary for the Bush/Quayle campaign, learned of the impending press conference from a reporter and telephoned Miller to say he was "amazed" that Kimberlin was to hold a press conference. Oct. 16, 1990 Deposition of Mark W. Goodin 73. Miller responded "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.*

Late in the afternoon of November 4, Quinlan ordered the press conference cancelled because, as he put it, "[t]he Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." Keating Memorandum at 3. Quinlan apparently maintained a consistent policy against press conferences by prisoners. *See* Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, Legal Times, Dec. 19, 1988, at 10 ("Quinlan . . . notes that he has not allowed a prison press conference since he became director of the bureau late last year.").[6]

---

6 The Bureau's regulations set out procedures for personal interviews, 28 C.F.R. § 540.63 (1988), and press pools in which one representative from each news medium participates, 28 C.F.R. § 540.64 (1988), but make no mention of press conferences. While Kimberlin does not challenge the regulations' validity, he does assert that because they do not prohibit press conferences he was entitled to hold one. The logic of Kimberlin's sub silentio argument eludes us. That which the regulations authorize is authorized; conversely what they do not authorize is not authorized. Further, the regulations provide that "[a]ny questions as to the meaning

At approximately 11:30 p.m. on November 4 Kimberlin was placed in administrative detention at Quinlan's direction. Sabol Letter at 3. The administrative detention order entered by the El Reno prison officials on November 4 recited as the reason for detention that Kimberlin "stated to the National news media this [sic] his life is in danger." November 4, 1988 Detention Order. A contemporaneous memorandum from Benefiel to Kimberlin's file stated that J.D. Williams, the Bureau's South Central Regional Director, had telephoned to report that a radio reporter had informed Miller that Kimberlin "feared retaliation and had fear for his safeth [sic]." November 4, 1988 Memorandum from R.C. Benefiel to Investigative File. The memorandum further noted that "the evening watch lieutenant . . . had been receiving information that inmates on the compound were saying that if Kimberlin will snitch on Quale [sic] he will do the same to us." *Id.* Benefiel's memorandum concluded: "Based upon the information about his being called a snitch and the telephone call from Mr. Williams it was decided that to insure the inmates [sic] safety he would be placed in administration detention until the matter could be throughly [sic] investigated by investigative staff. I directed the evening watch to make such placement." *Id.*

The following day, while Kimberlin was still in detention, Miller received another telephone call from Goodin who "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle

---

or application of this subpart are resolved by the Director of the Bureau of Prisons." 28 C.F.R. § 540.61(g). Quinlan has, as noted, apparently consistently exercised his discretion under this provision to prohibit prisoner press conferences and to limit inmates' press access to the more manageable settings expressly authorized under the regulations. To the extent that this policy may impinge on a prisoner's first amendment rights, it is nevertheless valid as "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

chances." October 11, 1989 Memorandum from Miller to Whom it May Concern (Miller Memorandum) at 4. Miller noted, however, that "Goodwin [sic] did not try in any way to influence the department's handling of Kimberlin." *Id.* Goodin himself denied seeking or receiving any "reassurances" from Miller, Goodin Deposition at 73, or ever speaking with anyone at the Bureau, *id.* at 90. In addition, Quinlan stated the Bureau received only a single call from the Bush/Quayle campaign regarding Kimberlin, the one described above, and that "[a]t no time during the entire period from Thursday, November 3rd through Election Day did anyone from the Bush/Quayle campaign ask or instruct the Bureau of Prisons to do anything with regard to this matter." Keating Memorandum at 4. Around 7:30 that evening, Kimberlin was released from detention after an investigation revealed no threat to his safety and "Kimberlin specifically stated he did not perceive a threat." Sabol Letter at 3.

On November 7, Kimberlin was again placed in administrative detention, this time, according to the Bureau, for violating a Bureau regulation prohibiting any prisoner from making a third-party telephone call, that is, a call placed to one party who electronically transfers it to another party. November 7, 1988 Incident Report; *see* 28 C.F.R. § 540.104 (1988) ("Third party billing and electronic transfer of a call to a third party are not permitted."). According to El Reno records, the third-party call occurred on November 4 when Kimberlin telephoned a friend who in turn connected him through a conference call to a lawyer for the Democratic National Committee. Nov. 14, 1988 Disciplinary Hearing Officer Report 2. The same records noted that Kimberlin admitted making the call but denied knowing it was proscribed. *Id.* He was found guilty of the violation after a hearing on November 14 and was released later that day. *Id.*

Kimberlin was placed in detention for a third time on December 22, according to the Bureau, for again violating

the third-party telephone prohibition. Local prison officials released Kimberlin on December 23 and found him not guilty because there was "no specific evidence that [Kimberlin] intentionally placed a conference/third-party call." January 9, 1989 Incident Report. This detention occurred a few days after news stories appeared describing Kimberlin's problems with prison officials and one day after Kimberlin had conducted two telephone interviews. Kimberlin Declaration at 4.

As previously noted, the foregoing facts are not in dispute. What is vigorously contested is the motivation for Kimberlin's three detentions. Kimberlin alleges the first two detentions were ordered to deny him access to the press while the third was in retaliation for his media interviews. The appellants, on the other hand, maintain that the detentions were ordered for the reasons set out above: the first to ensure Kimberlin's safety and the later two on account of the third-party call infractions. Specifically, they claim they are entitled to qualified immunity from suit because their actions were objectively reasonable under the facts as established in the record. We agree.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court established an objective test for qualified immunity under which "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 815-16. Since then the Court has made it clear that qualified immunity should be granted, and suit dismissed, where the plaintiff "not only failed to allege the violation of a constitutional right that was clearly established at the time of the [defendant's] action, but . . . failed to establish the violation of any constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991). The Court has emphasized that qualified immunity is "an *immunity from suit* rather than a

mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and that "[o]ne of [its purposes] is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991). Thus, it "ordinarily should be decided by the court long before trial," *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991), "at the earliest possible stage in litigation," *id.* at 536, and "such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell v. Forsyth*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817).

Because of the special immunity accorded government officials who act in an objectively reasonable manner, this court has established a "heightened pleading" standard for a plaintiff like Kimberlin who sues government officials and alleges unconstitutional motive. Ordinarily, "[u]nder Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'" so that entry of summary judgment is "mandated" "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56).[7] We impose a more stringent standard,

---

[7] As noted above, Miller's and Quinlan's motion was one for, alternatively, dismissal or summary judgment. Because the parties submitted and the district court considered materials outside the pleadings, we treat the motion as one for summary judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .").

however, on a plaintiff who charges a government official with a constitutional deprivation where the outcome depends on the official's state of mind. Such a plaintiff is subject to this circuit's so-called "heightened pleading" standard, requiring pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment.[8] *See Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986); *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987); *Martin v. Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987); *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989); *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991).[9] While refraining from adopting the direct/circumstantial distinction we employ, most other circuits have adopted some sort of "heightened pleading"

---

[8] When applied, as here, at the summary judgment stage, the expression "heightened pleading" is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("[W]e deprecate the expression 'heightened pleading' and speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment."). For summary judgment, the applicable standard might better be characterized as one of "heightened production."

[9] Recently, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), the Supreme Court rejected a heightened pleading standard in section 1983 suits alleging *municipal* liability but expressly noted it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 1162. The Court observed that "unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified," *id.*, suggesting the result might be different in individual capacity actions against government officials. The Court also noted that a true heightened pleading standard, applied to a motion to dismiss based solely on the pleadings, "is impossible to square with the liberal system of 'notice pleading' set up by the Federal Rules" and particularly with rule 8(a)(2)'s requirement that "'a complaint include only a short and plain statement that the pleader is entitled to relief,'" *id.* at 1163, a consideration that does not apply to a heightened standard of production at the summary judgment stage. *See supra* note 5. In any event, because the Court did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit.

standard to further the goal of qualified immunity, namely to protect government officials from the burdens of litigating "insubstantial claims," *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 817-18.[10]

---

[10] *See, e.g., Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990) ("We agree with the *Martin [v. Malhoyt]* court that a 'heightened pleading standard' is highly appropriate in actions against government officials."); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992) ("[T]his circuit requires that § 1983 plaintiffs meet heightened pleading requirements in cases, such as this, in which an immunity defense can be raised."); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint under § 1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) ("[W]e think that the best solution to the conundrum is to require the plaintiff to produce 'specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal.' Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery." (quoting *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring)); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989) ("Damage actions against government officials are subject to a heightened standard of pleading with sufficient precision '"to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds."' *Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting *Hobson v. Wilson*, 237 U.S. App. D.C. 219, 737 F.2d 1, 29 (1984))."); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) ("We believe a requirement that a plaintiff must put forward nonconclusory allegations of subjective motivation, supported either by direct or circumstantial evidence, before discovery may be had, satisfies *Harlow*'s directive that government officials should be shielded from 'insubstantial', lawsuits, while at the same time preserving the opportunity for plaintiffs to pursue meritorious claims."); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649-50 (10th Cir. 1988) ("We agree with the *Martin [v. District of Columbia Metro. Police Dep't]* court that '[t]he Supreme Court's "strong condemnation of insubstantial suits against government officials" impels the application of a standard more demanding of plaintiffs when public officer defendants move for summary judgment on the basis of their qualified immunity.' [*Martin*, 812 F.2d at 1435] (quoting *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984)). Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. In some instances only the pleadings are examined, see *Hobson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984) (heightened pleading standard required to proceed to discovery), while in others, such as the present case, the information that is developed by discovery before the motion is made should also be considered, *DeVargas [v. Mason & Hanger-Silas Mason Co.]*, 844 F.2d [714,] 719 (10th Cir. 1988)."); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) ("On a related

In *Whitacre*, we explained the rationale for our heightened pleading standard as follows:

> Since "substantial costs attend the litigation of the subjective good faith of government officials," *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737, and since the Court stressed the need to terminate insubstantial *Bivens*[11] claims before trial, *see id.* at 815-16, 102 S. Ct. at 2736-37, we have supplanted the liberal pleading requirements of the Federal Rules with a heightened pleading standard whenever a plaintiff in a *Bivens* claim alleges an unconstitutional motive.

890 F.2d at 1171 (citing *Malhoyt*, *Smith* and *Hobson*). More recently, in *Siegert*, we clearly explained how the standard applies to a summary judgment motion based on qualified immunity:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial,

---

question about pleadings (whether the complaint states a claim), we want to use this opportunity to repeat that, 'in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims we, and other courts, have tightened the application of Rule 8 to § 1983 cases.' *Arnold v. Board of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989) (citation omitted). In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred."). The Fourth Circuit recently observed: "Whether the purposes of *Harlow* in discriminatory animus cases are expressed by means of qualified immunity formulation or by a requirement of heightened pleading is not critical. In either case, courts have sought to achieve the same purpose, namely the effectuation of the aims of qualified immunity in claims which incorporate a subjective element." *Gooden v. Howard County*, 954 F.2d 960, 970 n.3 (4th Cir. 1992) (en banc).

11 In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court authorized damages actions against federal officials for constitutional torts.

> must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

895 F.2d at 801-02 (citing *Martin*, 812 F.2d at 1435); *see also Whitacre*, 890 F.2d at 1171 ("[W]e have imposed, in cases where the defendant's subjective intent is an essential part of the claim, a demanding requirement on the plaintiff in order to proceed to trial or obtain discovery. *See Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). '[T]o avert dismissal short of trial, [the plaintiff] must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some *direct evidence* that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.' *Id.* (emphasis added)."). Thus, in response to Miller's and Quinlan's motions below, Kimberlin was required to proffer *direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial

evidence. We conclude Kimberlin failed to sustain this burden.[12]

To establish unconstitutional motive for his first detention, Kimberlin relied primarily on alleged discrepancies among the various participants' accounts of the circumstances preceding the detention. On November 4, the date of Kimberlin's first detention, Miller spoke over the telephone at least twice with the radio reporter who, according to Miller, related that Kimberlin had told her the cancellation of the press conference "led him to believe his safety was threatened by the hostile attitude of the prison authorities." Miller Memorandum 2-3. Quinlan, consistently, maintained he placed Kimberlin in detention after, and because, he learned that the reporter had "advised Loye Miller . . . that she believed Kimberlin might be in some 'danger.'" Keating Memorandum at 3. The reporter, on the other hand, while admitting that an hour before his detention Kimberlin told her he "was concerned about what the Justice Department might do to him," denied having "quoted Kimberlin as saying his life was in danger." November 9, 1990 Declaration of Radio Reporter at 2. Kimberlin himself denied ever having "perceived" or "expressed" "fears that other inmates would harm [him]."

---

12 We recognize that in one recent section 1983 case alleging unconstitutional intent a panel of this court characterized the "heightened pleading" standard simply as requiring "nonconclusory allegations" that are "sufficiently precise" and "specific and concrete enough" to put the defendants on notice of the nature of the claim and enable them to prepare a response, including a summary judgment motion based on qualified immunity grounds, without any mention of either direct or circumstantial evidence. *Crawford-El v. Britton*, 951 F.2d 1314, 1317, 1320 (D.C. Cir. 1991). The reason for this omission appears to lie in the defendant-appellant's failure to raise the distinction in her discussion of the heightened pleading standard. *See* Brief for Appellant at 12-14, *Crawford-El*. Even so, in finding the plaintiff had met the standard, the *Crawford-El* panel expressly relied on "specific statements" by the defendant that showed her intent. *Id.* at 1321. In any event, the panel decision in *Crawford-El* did not, and could not, overrule the then established circuit requirement that a plaintiff plead or produce, depending on the stage of litigation, direct evidence of unconstitutional intent.

Kimberlin Declaration at 3.[13] Assuming, as we must on this motion, that the reporter's recollection of her conversations is correct and that she did not relay Kimberlin's fear of the Department to Miller, her account merely disputes Miller's description of their conversations, without contradicting the affirmative evidence that Quinlan ordered the detention because of information regarding Kimberlin's safety, whether or not accurately conveyed, that he received from Miller.[14] More importantly, none of the evidence Kimberlin cites does more than cast doubt on the appellants' stated reasons for their actions -- it does not constitute direct evidence that they acted out of any impermissible motive, as our circuit's heightened standard requires. *Cf. St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (title vii plaintiff does not carry burden of persuasion merely by disproving proffered explanation for firing but must affirmatively establish race as actual motivating factor).

In fact, the motive Kimberlin alleges -- denying him access to the press -- seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others, even during his detention. *See* Deposition of Richard D. Acuff, Exh. 4 (handwritten notes by prison staff documenting seven calls made by Kimberlin on

---

[13] In support of his claim, Kimberlin also cites a statement by Miller that he was "pretty sure" that Kimberlin was already in detention before he spoke with the Bureau. Miller Memorandum at 4. This equivocal statement is inconsistent, however, with Miller's recollection that he telephoned the Bureau at "perhaps 11 p.m." *Id.* at 2, which would have been 10:00 p.m. in El Reno, Oklahoma, a full hour and a half before Kimberlin was placed in detention.

[14] Given this evidence, Quinlan acted in an objectively reasonable manner in ordering Kimberlin's detention until his safety could be assured. Prison officials have an obligation to provide prisoners with reasonable protection from foreseeable violence. *See, e.g., Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986). Thus, given the information he received from Miller, Quinlan would have been remiss, and risked liability, had he failed to order detention and Kimberlin subsequently came to harm. Of course, by ordering the detention Quinlan also risked (and got) a lawsuit.

November 5 during his detention); November 7, 1988 Memorandum of T.C. Martin to J. Michael Quinlan (referring to "[s]even cassette tapes" containing "copies of the telephone conversation by Brett Kimberlin with numerous news media personnel, family and friends"); Sabol Letter at 3 ("Kimberlin spoke to the radio reporter "again on Saturday, November 4, 1988, while he was still in detention"). Further, the timing and tenor of Miller's conversations with the Bush/Quayle campaign belie any influence from that source. Because there is no direct evidence that Miller attempted to secure Kimberlin's detention or that Quinlan did so for any reason other than Kimberlin's safety, we conclude the district court erred in denying summary judgment as it related to Kimberlin's first detention.

Kimberlin's second allegation, that the November 7 detention was also ordered to deny him access to the press, fares no better. First, Kimberlin has cited no direct evidence that either Quinlan or Miller was even involved in this detention which appears to have been ordered by local prison officials. *See* Sabol Letter at 4 ("[T]his placement in administrative detention and the one in December, 1988, were both done at the local level and did not involve any direction or consultation with staff members of the Bureau of Prisons or the Department of Justice in Washington."); Keating Memorandum at 4 ("[T]he local officials decided to place Kimberlin in detention on Monday morning. The Central Office was not involved in that decision.").[15] In

---

[15] Kimberlin cites two newspaper articles as evidence to support Quinlan's involvement in the November 7 detention: one in the *New York Times* quoting Miller as saying "Mr. Kimberlin was twice placed in administrative detention on the order of J. Michael Quinlan, head of the Federal Bureau of Prisons," *Solitary for Quayle's Accuser*, N.Y. Times, Dec. 20, 1988, at B9, and a second in the *Legal Times* similarly quoting Miller as asserting that "[t]he Bureau of Prisons caught on that he was going to hold another press conference so they put him back in," Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, Legal Times, Dec. 19, 1988, at 10. Such hearsay, however, cannot defeat a summary judgment motion. While it is not necessary that "the nonmoving party must produce evidence in a form that would be admissible at trial in order to

addition, as already noted, it is beyond dispute that Kimberlin violated the published third-party call regulation -- the reason the Bureau proffered for his second detention both contemporaneously, *see* November 7, 1988 Incident Report; November 14, 1988 Disciplinary Hearing Officer Report, and subsequently, *see* Keating Memorandum 96; Sabol Letter at 68–69. Kimberlin has come forth with no direct evidence of any other motive for this detention.[16]

---

avoid summary judgment," *Celotex*, 477 U.S. at 325, "normally" hearsay "would not be enough to raise an issue of fact for summary judgment purposes," *Crawford-El v. Britton*, 951 F.2d 1314, 1320 (D.C. Cir. 1991). Specifically, "A third party's description of [a witness's] supposed testimony is not suitable grist for the summary judgment mill." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). Thus, the two newspapers' characterizations of Miller's statements are useless to Kimberlin. Further, as there is no evidence that Miller was involved in or had special information about the November 7 detention, his opinion regarding who ordered it or why cannot be viewed as direct evidence so as to satisfy our heightened standard.

16 In her June 19, 1990 letter, Sabol wrote:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention, to avoid a violation of our rules and protect the integrity of institution security.

Id. at 3-4. There is nothing to suggest, however, that her explanation was based on information obtained from those involved (local officials) or even purportedly involved (Kimberlin and Miller) in the detention decision so as to constitute direct evidence of their intent.

Kimberlin also cites as evidence of improper intent that he was placed in detention before being found guilty of violating the third-party call regulation. *See* 28 C.F.R. § 541.22 (authorizing an inmate to be placed in administrative detention only (1) "when the inmate is in holdover status (i.e., en route to a designated institution) during transfer, or is a new commitment pending classification" or (2) "when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution" and one of six enumerated conditions is also present). This evidence, however, even if probative of intent, is wholly circumstantial and would therefore be insufficient to satisfy our heightened standard.

Finally, the appellants are entitled to qualified immunity on Kimberlin's claim that the December 22 detention was retaliatory because the record is also devoid of any direct evidence that either appellant was involved in that detention which, according to El Reno records, was imposed by local officials for a second alleged violation of the third-party call regulation.

In sum, Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened standard are intended to cut short. Accordingly, the district court's denial of the individual defendants' motion to dismiss or for summary judgment on the first amendment claims is

Reversed and remanded.

WILLIAMS, *Circuit Judge*: I concur in the opinion of the court. When a plaintiff claims that an official enjoying qualified immunity has committed a constitutional tort involving motive, circuit precedent requires the plaintiff to proffer "direct" (as opposed to circumstantial) evidence of the illicit motive before obtaining discovery against the official. See Maj. Op. at 8-12; *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), aff'd on other grounds, 111 S. Ct. 1789 (1991); *Whitacre v. Davey*, 890 F.2d 1168, 1171 & n. 4 (D.C. Cir. 1989). Plaintiffs here have not met that standard. Maj. Op. at 13-17.

This is not to say that circuit law is correct. The restriction arose out of an effort to reconcile conflicting goals: to protect officials with qualified immunity from undue litigation burdens and to afford legal remedies for citizens whose rights may have been abused. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), had framed the qualified

immunity test in objective terms precisely because a rule that sheltered an official only *after* he had incurred the burdens of discovery into his motivation -- a highly subjective issue -- would be pretty flimsy shelter. *Id.* at 814-19; see also *Elliott v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991). In adopting the "direct" evidence rule for constitutional torts involving motive, we reasoned that *Harlow* logically required an especially high threshold showing of unconstitutional motive before defendant should be exposed to discovery. *Whitacre*, 890 F.2d at 1171.

The distinction between direct and circumstantial evidence, however, appears completely arbitrary and unrelated to the strength of the plaintiff's case. As Judge Easterbrook pointed out in *Elliott*, the requirement would be fatal except in the rare case of the defendant's confession. 937 F.2d at 345. At the same time, while a perjured claim of having heard such a confession would meet the test, a massive circumstantial case would not. And, speaking for the Ninth Circuit, Judge Hall noted that evidence of the defendant's intent was likely to be peculiarly under his control. *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991). It is hardly surprising that the only circuits to consider our direct evidence rule have rejected it. *Elliott; Branch*. Both circuits concluded that it was enough for plaintiff to put forward specific, non-conclusory allegations, *Elliott*, 937 F.2d at 344-45; *Branch*, 937 F.2d at 1387, which we require even in cases having nothing to do with motive, see *Andrews v. Wilkins*, 934 F.2d 1267, 1269-70 (D.C. Cir. 1991); *Hunter v. District of Columbia*, 943 F.2d 69, 76-77 (D.C. Cir. 1991).

The simple requirement of specific, non-conclusory allegations may not be the only reasonable alternative to *Siegert*. Doubtless recognizing the vulnerability of the direct evidence rule, the Justice Department here argued a fallback position. A plaintiff could get to discovery only by making a showing of illicit intent so strong that, if the specific facts alleged were accepted as true, any reasonable jury would have to infer illicit motive. (Discovery and ultimately trial would of course be necessary to determine whether the

specific allegations were true.) Appellant's Brief at 30-32. The proposal bears some resemblance to a test devised for cases where plaintiff claimed that officials with qualified immunity had conducted electronic surveillance, with lawfulness turning on whether they had done so for national security purposes. *Halperin v. Kissinger*, 807 F.2d 180, 184-85 (D.C. Cir. 1986). There we said defendants' summary judgment motion should be granted if they "adduce[d] sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to . . . plaintiffs, could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons". *Id.* at 189; see also *id.* at 188 (immunity defense prevails "if the facts establish that the purported national security motivation would have been reasonable"). The rule proposed by the appellants seems more stringent than the one we adopted for a situation that combined inquiry into motive with national security concerns, so it may be logically unsustainable. If the direct evidence rule is reexamined *en banc*, however, the reconsideration should encompass alternatives.

EDWARDS, *Circuit Judge*, dissenting: Brett Kimberlin, a federal inmate, claims in this case that the Director of the Bureau of Prisons and the Director of Public Affairs at the Department of Justice violated his First Amendment rights when they caused him to be placed in "administrative detention" to retaliate against him for trying to talk with the media. According to Kimberlin, this retaliation occurred in conjunction with the federal officials' attempts to prevent him from telling his story that he allegedly sold marijuana to former Vice President Quayle when Quayle was in law school. The majority now holds that, under a so-called "heightened pleading" standard, Kimberlin's lawsuit must be dismissed because his complaint rests on "circumstantial evidence." In my view, this result is misguided and unfair; it also stands at odds with the Supreme Court's most recent pronouncements on "heightened pleading."

On March 3, 1993, the Supreme Court held that a federal court may not apply a "'heightened pleading standard' -- more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure -- in civil rights cases alleging municipal liability under [42 U.S.C. § 1983 (1988)]." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1161 (1993). In reaching this conclusion, the Court wrote that "it is *impossible* to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163 (emphasis added). The Court also made it clear that a heightened pleading requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* Although the Supreme Court did not address the immunity issues present in this case, *id.* at 1162, the rationale underlying the decision in *Leatherman* -- that standards of "heightened pleading" are *fundamentally incompatible* with FED. R. CIV. P. 8(a) -- casts doubt on the validity of *any* judge-made "heightened pleading" standard imposed in *any* context. *See id.* at 1163.

Despite the strong message sent by the Supreme Court in *Leatherman*, the majority in the instant case embraces a heightened pleading standard without giving serious attention to its validity or wisdom. To make matters worse, the majority adds an insupportable gloss to the standard, distinguishing between direct and circumstantial evidence, thereby requiring *Bivens*[17] plaintiffs to plead direct, as opposed to circumstantial, evidence of unconstitutional motive, or suffer immediate dismissal of their suits. Ours is the only circuit that imposes such a requirement on civil rights plaintiffs.[18] I dissent because,

---

17 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

18 Three circuits have considered and explicitly rejected a heightened pleading standard that requires the plaintiff to plead direct, as opposed to circumstantial, evidence of unconstitutional intent. *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, *and cert. denied*, 112 S. Ct. 1242 (1992); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

even assuming that a heightened pleading standard can be valid, the majority's so-called "direct evidence rule" has no foundation in reason or in the case law.

I. BACKGROUND

The infirmity and unfairness of the so-called "direct evidence rule" is starkly apparent in this case, in which a *Bivens* plaintiff has provided ample -- albeit circumstantial -- evidence that government officials twice violated his First Amendment rights. Brett Kimberlin, a federal inmate, alleges that J. Michael Quinlan, the Director of the Bureau of Prisons ("BOP"), and Loye W. Miller, Jr., the Director of Public Affairs at the Department of Justice ("DOJ"), violated his First Amendment rights when they caused Kimberlin to be placed in "administrative detention" to silence him and to retaliate against him for trying to tell his Quayle story to the media.[19] Although Kimberlin has not had the benefit of discovery, he has submitted to the court numerous affidavits, prison documents, newspaper articles, and memoranda written by the defendants that provide strong circumstantial evidence in support of his allegations.

The events in this case took place shortly before and after the 1988 presidential election, during which time Kimberlin was incarcerated at the federal prison in El Reno, Oklahoma. About two weeks before the election, Nina Totenberg, a journalist, received a tip that Kimberlin had sold marijuana to vice-presidential candidate Quayle when Quayle was in law school. Totenberg interviewed Kimberlin by telephone, and arranged for Kimberlin to give an affidavit verifying his story. Declaration of Nina Totenberg, *reprinted in* Joint Appendix ("J.A.") at 79, 79. Thereafter, Totenberg sent the Kimberlin affidavit to Mark Goodin, the

---

[19] Kimberlin also alleges that the defendants caused him to suffer continual harassment for exercising his First Amendment rights when he was placed in administrative detention on December 22, 1988, after talking to reporters about his Quayle story. However, Kimberlin has not corroborated this allegation with specific facts linking the defendants to the December 22 detention; therefore, I agree that it does not survive a heightened pleading standard.

deputy press secretary of the Bush-Quayle campaign; Goodin, in turn, then showed the affidavit to James Baker, the Bush-Quayle campaign chairman, Lee Atwater, the Bush-Quayle campaign manager, and Stuart Spencer, the Quayle campaign manager. Deposition of Mark Wayne Goodin, *reprinted in* J.A. at 97, 99-103.

At about this time, other news organizations became interested in Kimberlin's story and began requesting interviews. Prison officials in El Reno agreed to allow NBC to interview Kimberlin on November 8, 1988, election day. Not satisfied, NBC threatened to broadcast Kimberlin's allegations and run a "cover-up" story unless an earlier interview could be arranged. On Thursday, November 3, the Central Office of the BOP in Washington, D.C. asked the prison officials in El Reno to arrange for an earlier interview. Director Quinlan later wrote in a memorandum that "Kimberlin's fundamental lack of credibility, and the likelihood of unnecessarily precipitating a 'cover-up' story just before the election, were major factors in the decision to permit the original NBC interview on an earlier schedule." Memorandum from J. Michael Quinlan to Francis A. Keating, II (Dec. 22, 1988), *reprinted in* J.A. at 93, 94.

NBC interviewed Kimberlin at the prison from 11:30 a.m. until 12:15 p.m. on Friday, November 4. Memorandum from R.C. Benefiel to Investigative File (Nov. 4, 1988), *reprinted in* J.A. at 49. Meanwhile, because prison officials had received so many requests for interviews with Kimberlin, Roger Benefiel, the Acting Warden in El Reno, suggested that a "joint interview" or "press conference" be held. Kimberlin agreed to the press conference, which was scheduled for 7:00 p.m. that evening. Administrative Tort Claim #89-324, Letter from Carolyn A. Sabol to Howard T. Rosenblatt (June 19, 1990), *reprinted in* J.A. at 66, 67; Declaration of Brett C. Kimberlin, *reprinted in* J.A. at 72, 72-73. Director Quinlan cancelled the press conference. Quintlan/Keating Memorandum, *supra*, J.A. 95, Reporters who arrived at the prison for the press conference were told that it had been cancelled due to "unfor[e]seen

circumstances." Press Release (Nov. 4, 1988), *reprinted in* J.A. at 37.

Later that night, Director Quinlan ordered Kimberlin into "administrative detention," which, according to BOP regulations, confines the inmate in a special cell and removes him from the general prison population. 28 C.F.R. § 541.22 (1992). At 10:30 p.m. on November 4, Kimberlin was handcuffed, wheelbarrow-marched across the outdoor compound without a coat, strip searched, and locked into a small cell. Kimberlin Declaration, *supra*, J.A. 73. He was expressly forbidden to make phone calls until the next afternoon, when a duty officer demanded that he call Totenberg. *Id.* at 74; FCI El Reno Special Housing Unit Record, *reprinted in* J.A. at 87. Kimberlin was released at 7:30 p.m. on Saturday, November 5.

That weekend, Kimberlin made several phone calls to arrange a telephone interview with reporters who would gather at the Mayflower Hotel in Washington, D.C. on the morning of Monday, November 7, the day before the election. Again, the interview with the press never took place. At 9:00 a.m., before the planned telephone interview, Kimberlin was once more taken to the administrative detention unit, strip searched, and locked in a detention cell, this time for seven days. Kimberlin was allowed to call his lawyer, but not his family or the press. Kimberlin Declaration, *supra*, J.A. 74-75.

Thus, Kimberlin was confined in administrative detention on two separate occasions, either immediately after or prior to contact with the media. The *timing* of these detentions alone supports an inference that they were intended to silence Kimberlin or retaliate against him for speaking to the media. This inference is further supported by the conflicting, and seemingly pretextual, explanations offered by Directors Quinlan and Miller regarding the reasons for Kimberlin's detentions. Indeed, there are many details of the Quinlan and Miller stories that strongly support a claim that they acted with a purpose to infringe Kimberlin's clearly established First Amendment rights.

First, there are inconsistencies in the Quinlan and Miller stories concerning the reason for Kimberlin's November 4 detention. In a memorandum, Quinlan explains that he instructed the El Reno officials to place Kimberlin in detention, "pending an assessment of any possible threat," after being informed that Nina Totenberg had told Miller of the DOJ that "she believed Kimberlin might be in some 'danger.'" Quinlan/ Keating Memorandum, *supra*, J.A. 95. Miller confirms that he learned from Totenberg that Kimberlin had expressed fear for his safety, but denies that safety concerns had any influence on the decision to put Kimberlin in detention. Memorandum from Loye Miller to Whom It May Concern (Oct. 11, 1989), *reprinted in* J.A. at 82, 84-85.

Second, there is further evidence that the justification that Kimberlin was placed in detention for his protection is pretextual. In a sworn statement, Totenberg denies that she "quoted Kimberlin as saying his [ ] life was in danger." Totenberg Declaration, *supra*, J.A. 80. Kimberlin also denies having expressed concern for his safety. Kimberlin Declaration, *supra*, J.A. 73-74. Furthermore, there was no reason to restrict Kimberlin's phone calls if he was in detention for his safety; in fact, prison regulations *require* the warden to establish procedures for inmates in segregation to make phone calls. 28 C.F.R. § 540.105 (1992). Yet, Kimberlin was expressly forbidden to make phone calls during the first detention until the afternoon of November 5. Kimberlin Declaration, *supra*, J.A. 74; Special Housing Unit Record, *supra*, J.A. 87.

Third, it was highly unusual for high-ranking officials such as Miller and Quinlan to become involved in an administrative detention decision. John Pendleton, congressional liaison for the BOP, told the *Legal Times* that he could not "think of another instance in which the director of the bureau made the decision to place an inmate in administrative detention. The system houses some 45,000 inmates." Aaron Freiwald, *Isolation for Inmate with Quayle Claims*, LEGAL TIMES, Dec. 19, 1988, *reprinted in* J.A. at 88, 90.

Fourth, there are conflicting and pretextual explanations regarding Kimberlin's second detention, and the Quinlan and Miller involvements with it. In various writings, Quinlan denies that he or the BOP's Central Office was involved in ordering the second detention. Quinlan/Keating Memorandum, *supra*, J.A. 96; Letter from J. Michael Quinlan to Robert W. Kastenmeier (Aug. 29, 1990), *reprinted in* J.A. at 106, 108. But Miller told the *New York Times* that "Kimberlin was *twice* placed in administrative detention on the order of *J. Michael Quinlan*." *Solitary for Quayle's Accuser*, N.Y. TIMES, Dec. 20, 1988, *reprinted in* J.A. at 109 (emphasis added). Furthermore, on November 7, Quinlan was sent the tapes of Kimberlin's telephone conversations "with numerous news media personnel, family and friends," and the report of an investigative supervisor at the prison who had "spent the past three days" working on the case. Memorandum from T.C. Martin to J. Michael Quinlan (Nov. 7, 1988), *reprinted in* J.A. at 111. Thus, there is evidence that strongly suggests that Quinlan was following Kimberlin's situation closely, and may well have been involved in ordering the second detention. Miller, who also denies involvement with the second detention, acknowledges that he called the BOP on the morning of November 7 and learned that Kimberlin had again been detained. Miller Memorandum, *supra*, J.A. 85-86. Thus, Miller too was closely tracking Kimberlin's status.

The explanation that Quinlan and the BOP have offered for the second detention is contradicted by prison documents. In a letter to Senator Joseph Biden, Quinlan stated that Kimberlin was sent to detention for a violation of prison regulations committed on *Monday, November 7*, when he attempted to place a call through a third party. Letter from J. Michael Quinlan to Joseph R. Biden, Jr. (Dec. 22, 1988), *reprinted in* J.A. at 77, 78. In a later letter, Quinlan wrote that "Kimberlin was *attempting to set up a telephonic press conference*, using an impermissible 'third party' procedure .... The telephone violation was the sole reason that the local officials decided to place him in detention on Monday morning ...." Quinlan/Kastenmeier Letter, *supra*, J.A. 108 (emphasis added); *see also* Administrative Claim,

supra, J.A. 68-69 (stating that "[o]n Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention . . . ."). According to prison documents, however, Kimberlin was charged and found guilty of violating prison regulations for placing a third-party phone call on *Friday, November 4*, when he had attempted to call Susan Estrich, the manager of the Dukakis campaign, through a third party. *See* Incident Report (Nov. 7, 1988), *reprinted in* J.A. at 53; Disciplinary Hearing Report (Nov. 14, 1988), *reprinted in* J.A. at 56, 56-57.

Miller himself has contradicted the BOP's explanation that Kimberlin was placed in detention for violating prison telephone rules. Miller wrote in a memorandum that "[i]t was certainly my understanding at the time that it was this attempt to hold an unauthorized press conference which directly caused [Kimberlin] to be segregated once again." Miller Memorandum, *supra*, J.A. 86. The *Legal Times* quotes Miller as saying that "[t]he BOP caught on that [Kimberlin] was going to hold another press conference, . . . so they put him back in." *Isolation for Inmate*, *supra*, J.A. 90.

Fifth, there is uncontested evidence that the Bush-Quayle campaign was in close contact with Quinlan at the BOP and Miller at the DOJ during the time when Kimberlin was trying to contact the media and being placed in detention, and that Bush-Quayle campaign officials were concerned about the possible impact of Kimberlin's story on the election. According to Quinlan, the Bush-Quayle campaign called the BOP on November 3 to learn more about the NBC interview with Quinlan. Quinlan/Keating Memorandum, *supra*, J.A. 96. When campaign official Mark Goodin learned about the press conference that was to take place on November 4, he called the DOJ and spoke with Miller and one of his assistants. Miller's assistant informed Goodin that, "unless there was an immediate security concern, . . . it was within a prisoner's parameters to [hold a

press conference.]" Goodin Deposition, *supra*, J.A. 104. Miller, who was already apprised of the press conference, confirmed his assistant's information:

> [Goodin] said "This Kimberlin fellow apparently is going to have a press conference. I'm amazed."
>
> [Miller] said, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations."
>
> And [Goodin] said, "I am bowled over."
>
> And [Miller] said, "Its a fact."

Id. at 105.

Further, Goodin was in close contact with Miller over the weekend of November 5, when Kimberlin was setting up his telephone interview for November 7. Goodin called Miller several times that weekend to ask about the Kimberlin situation and to update Miller on the Quayle campaign's strategy if the Kimberlin story were to break. Goodin told Miller that he planned to travel with Quayle on Monday to handle press relations. Miller Memorandum, *supra*, J.A. 85.

Sixth, Quinlan's explanation of his sudden decision to cancel the November 4 press conference at the prison is entirely suspect. Reporters were told that the press conference was cancelled due to "unfor[e]seen circumstances." Press Release, *supra*, J.A. 37. Quinlan later wrote in a memorandum that he learned about the press conference from a wire service's inquiry, and that his decision to cancel the conference was based on "the fact that the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize

inmate press conferences." Quinlan/Keating Memorandum, *supra*, J.A. 95. Contrary to Quinlan's statement, however, the BOP's regulations do *not* disallow press conferences. *See* 28 C.F.R. § 540.63(h)(4) (permitting the Warden to "[l]imit the . . . number of media personnel entering the institution if the Warden determines that the requested . . . personnel would create a disruption within the institution"); *see also* 28 C.F.R. § 540.64 (permitting the Warden to establish a press pool "whenever he or she determines that the frequency of requests for interviews and visits reaches a volume that warrants limitations"). In fact, prison officials at El Reno initially suggested the press conference. Administrative Claim, *supra*, J.A. 67.

Miller of the DOJ may also have been involved in the cancellation of the November 4 press conference. According to Miller, he called the BOP on November 4 to ask about the press conference. He did not talk to Quinlan, and was unsure whether the BOP knew about the press conference before his call. An hour or two later, Miller heard that, "when Director Quinlan had learned that the prison warden was about to allow a Kimberlin press conference, he (Quinlan) had ordered it called off." Miller Memorandum, *supra*, J.A. 82-83. According to Nina Totenberg's affidavit, Miller told her that the press conference had been cancelled per orders from the DOJ. Totenberg Declaration, *supra*, J.A. 80.

To summarize, the record shows that Quinlan and Miller have offered conflicting, inconsistent and seemingly pretextual explanations for Kimberlin's detentions on November 4 and 7. There is further evidence that the Bush-Quayle campaign officials were in close contact with Miller during the time of Kimberlin's detentions and were upset over the possibility of Kimberlin's story receiving media attention. Quinlan (and possibly Miller) directly prevented Kimberlin from speaking with reporters on November 4, and Quinlan has offered an incredible explanation for his decision to cancel that press conference. The record thus contains powerful circumstantial evidence of the

defendants' illegal motivation for placing Kimberlin in detention.

The information that Kimberlin has presented also satisfies a heightened pleading standard (assuming we may apply one). He has provided the specific dates, events and actions surrounding his allegations, thereby putting the defendants on notice of the charges against them. He has corroborated the facts pled in his allegations with administrative documents and newspaper articles, and has provided reliable evidence -- such as affidavits and federal regulations -- that cast suspicion on the veracity of the defendants' denials. He has also alleged that the defendants took certain action -- specifically, causing him to be placed in administrative detention -- that, if proven at trial, would support the inference that the defendants acted with impermissible motive. In short, the plaintiff has provided nonconclusory, factually-based, and specific allegations of unconstitutional intent. To expect more from Kimberlin would be to compel him to prove his case at the pleading stage, something that neither the Federal Rules nor common sense require.

II. THE HEIGHTENED PLEADING STANDARD

Generally, in civil cases, plaintiffs are entitled to discovery if they set forth in their complaint a "'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P. 8(a)(2)). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), however, the Supreme Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. The purpose of the qualified immunity rule in *Harlow* was to dispose of "insubstantial" claims prior to discovery and trial. *See id.* at 815-16. Thus, *Harlow* held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Although the Court purported to eliminate inquiry into the subjective intent of Government officials, *Harlow* did not discuss cases in which unconstitutional motive is an essential element of the claim.

Two years after the decision in *Harlow*, this court considered the question not reached in *Harlow*. In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court held that, in cases in which the motive of Government officials is an essential element of the claim, a plaintiff's pleading must rest on nonconclusory allegations to support a claim of unconstitutional motive. *See id.* at 29. *Hobson* did not distinguish between "direct" and "circumstantial" evidence; however, six years after *Hobson*, in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), a different panel of the court held that a plaintiff's pleadings must provide direct, as opposed to circumstantial, evidence of unconstitutional motive in order to survive a motion to dismiss.

Hobson and *Siegert* are irreconcilable in their commands, thus it appears that the panel in *Siegert* ignored the law of the circuit in adopting a "direct evidence rule." Nonetheless, the majority in this case ignores *Hobson* and relies on *Siegert*, instead, in dismissing Kimberlin's case. Even if *Siegert* can somehow be read merely as an "outgrowth" of *Hobson* -- a fanciful claim, I think -- it ought to be reconsidered by the court *en banc*. The simple truth here is that a "direct evidence rule" finds no support in the Federal Rules, is at odds with Supreme Court precedent, defies the case law of this and other circuits, and is a nonsensical notion.

As an initial matter, as noted above, the Supreme Court's recent decision in *Leatherman* calls into question even the underlying rationale of the heightened pleading standard in *Hobson*. In *Hobson*, this court justified the heightened pleading requirement as a "firm application of the Federal Rules of Civil Procedure." *See Hobson*, 737 F.2d

at 29-30 & n. 86 (citing *Butz v. Economou*, 438 U.S. 478, 508 (1978)). In *Leatherman*, however, the Supreme Court held that it was "*impossible to square*" a heightened pleading standard similar to the one in *Hobson*[20] with the "liberal system of 'notice pleading' set up by [FED. R. CIV. P. 8(a)]." *Leatherman*, 113 S. Ct. at 1163 (emphasis added). Further, the Supreme Court noted that Rule 9(b) contains an exclusive list of actions for which particularized pleading may be required, and that, in the absence of an amendment to the Rules, the courts may not require particularized pleading in causes of action not listed in Rule 9(b). *Id.*; *see* FED. R. CIV. P. 9(b) (requiring particularized pleading in cases alleging fraud and mistake). The Court's decision in *Leatherman* thus employs a strict reading of Rules 8 and 9 that suggests strongly that any heightened pleading standard is *impossible to square* with the Rules, and is therefore invalid.[21]

---

[20] The heightened pleading standard struck down in *Leatherman* required "'that the plaintiff's complaints state with factual detail and particularity the basis for the claim.'" 113 S. Ct. at 1163 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

[21] The majority's suggestion that *Leatherman* is distinguishable because it spoke only to the standard of pleading for motions to dismiss, *see* Maj. Op. at 9 n.9, is disingenuous. Although the majority chooses to treat appellants' motion as one for summary judgment, the majority's reading of this court's precedents makes clear that it would reach the same result were this strictly a motion for dismissal. *See id.* at 8 (D.C. Circuit's heightened pleading standard "requir[es] pleading of specific *direct* evidence of intent to defeat a motion to dismiss") (emphasis in original); 9 (citing cases applying heightened pleading standard to motions to dismiss, *e.g.*, *Siegert*; *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990)).

Moreover, calling plaintiff's burden one of "production" rather than "pleading" draws a distinction without a difference. For the fact remains that in this circuit, plaintiffs alleging unconstitutional motive are not afforded *any* discovery unless their *pleadings* meet a certain threshold, higher than that required by the Federal Rules of Civil Procedure. In the ordinary summary judgment context, Rule 56(f) expressly gives the trial judge broad discretion to order discovery prior to ruling on a summary judgment motion, where the party opposing the motion cannot "present by affidavit facts essential to justify the party's opposition . . ." FED. R. CIV. P. 56(f). Yet the cases on which the majority relies effectively strip the trial judge of that discretion. *See Siegert*, 895 F.2d at 802 (plaintiff must plead intent with specific, discernible facts or direct evidence "in order to obtain even limited discovery"); *Whitacre* 890 F.2d at 1171 n.4 (plaintiff's claim "must be dismissed immediately" in absence of direct evidence of unconstitutional intent). The net effect, therefore, is to require plaintiffs'

Even if we assume that *some* form of a heightened pleading requirement may be imposed in cases involving a qualified immunity defense, today's holding still cannot stand. Nothing in *Hobson* reasonably can be read to invoke a categorical distinction between direct and circumstantial evidence. Rather, the court in *Hobson* ruled that,

> in cases involving a claim that defendants acted with an unconstitutional motive, we will require that *nonconclusory allegations [or] evidence of such intent* must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.

737 F.2d at 29 (emphasis added). *Hobson* also stated that "*Harlow* requires that merely conclusory allegations of unconstitutional motive, *devoid of factual support*, must be found lacking and dismissed." *Id.* at 31 (emphasis added). Thus, the pleading standard in *Hobson* was intended to ensure that there was a factual basis for the plaintiff's allegations and that Government officials be put on notice of the specific claims against them; *Hobson* was not concerned about the plaintiff's use of direct as opposed to circumstantial evidence.[22]

The court's later decision in *Siegert* inexplicably characterizes the complaint in *Hobson* as "an example of

---

pleadings to meet a higher threshold than is required by the Rules -- a result that *Leatherman* disparages.

22 The *Hobson* panel derived its heightened pleading standard from the Second Circuit's requirement of pleading with particularity in civil rights complaints. The Second Circuit's rule provides that "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Hobson*, 737 F.2d at 30 (quoting *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977)).

allegations of direct evidence of improper motivation that *will* overcome a defense of qualified immunity." *Siegert*, 895 F.2d at 804. A careful examination of *Hobson* reveals that the complaint in that case referred to memoranda that provided "direct evidence" of the unconstitutional intent of only two of the five *Hobson* defendants; the illegal intent of the other three *Hobson* defendants was established by strong circumstantial evidence. *See Hobson*, 737 F.2d at 8-9 (noting that incriminating memoranda were issued by defendants Brennan and Moore, but not by defendants Jones, Grimaldi and Pangburn).[23] If *Siegert* really meant to adhere to *Hobson* as it arose and as it was decided, then the direct evidence requirement enunciated in *Siegert* cannot be seen to rest on a categorical distinction between direct and circumstantial evidence, and the pleading standard in *Siegert* can be reconciled with the pleading standard in *Hobson*. Instead of direct evidence, *Siegert* can be read to require precise, nonconclusory allegations supported by direct *or circumstantial* evidence of unconstitutional intent -- which is exactly what the complaint in *Hobson* provided. *See Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991) (reasoning that *Siegert* "does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions, namely tangible allegations of concrete facts corroborative of [the plaintiff's] own subjective version of the events"). However, if the *Siegert* court really meant to

---

[23] *Siegert* noted that "[the *Hobson*] complaint referred to specific memoranda admitting that the [COINTELPRO-New Left] program's express purpose was to disrupt plaintiffs' political activities." *Siegert*, 895 F.2d at 804. In fact, only two of the five *Hobson* defendants were actually authors of some of the incriminating memoranda; the other three defendants were known to have been supervisors in a division of the FBI during the time in which that division had engaged in COINTELPRO activities. *See Hobson*, 737 F.2d at 8-9. The "specific memoranda" to which the *Hobson* complaint referred had been summarized in a 1976 Senate Report studying the Government's domestic intelligence activities. *See id.* at 10 n.8; *see also* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. No. 755, 94th Cong., 2d Sess. 86-93, 211-23 and accompanying footnotes (1976).

require direct as opposed to circumstantial evidence, then the pleading standard adopted by *Siegert* cannot be reconciled with *Hobson*.

The apparent confusion of the *Siegert* majority over the meaning of the standard in *Hobson* can be traced to several decisions rendered in the aftermath of *Hobson*. In *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), the panel majority held that a plaintiff must present "more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated . . . ." *Id.* at 1435. *Martin* borrowed the "direct evidence" language from a trial court in Maryland, which had fashioned a "direct evidence" pleading requirement out of whole cloth. *Harris v. Eichbaum*, 642 F. Supp. 1056, 1066 (D. Md. 1986), *cited in Martin*, 812 F.2d at 1435. Although this ill-chosen language appears to be the source of the direct evidence standard, a close examination of the reasoning in *Martin* reveals that there is no basis (other than the bare, unexplained words) to believe that the *Martin* majority intended to require plaintiffs to plead direct, as opposed to circumstantial, evidence of unconstitutional motive. Certainly, there is no reason to elevate this language, plucked from a district court opinion, over the binding precedent established by this court in *Hobson*.

First, and most tellingly, the majority opinion in *Martin* explicitly affirmed an intention to remain faithful to *Hobson* . In its holding, *Martin* instructed the trial court to defer its decision on the defendants' motion for summary judgment until after the plaintiff had obtained limited discovery[24] and had presented "an amended complaint

---

[24] In *Martin*, the primary issue was whether the defendants might obtain limited discovery for the purpose of meeting the heightened pleading standard, and the secondary issue was whether the pleadings in the case were sufficient. The panel majority held that strictly limited discovery could be allowed before a plaintiff was required to meet the heightened pleading standard. 812 F.2d at 1438. Judge Starr entered his strong dissent to the *Martin* majority's decision to allow this limited discovery. *Id.* at 1439-40, 1442 (Starr, J., dissenting in part). The *en banc* court thereafter granted rehearing and vacated the section of the *Martin* majority opinion that discussed the pleading standard and allowed

meeting the standard set out in Hobson, 737 F.2d at 29." *Martin*, 812 F.2d at 1438 (emphasis added). Thus, *Martin* purported to be faithful to the heightened pleading standard in *Hobson*. *See also id.* at 1434 (quoting *Hobson*, 737 F.2d at 30, that plaintiffs "must 'produce some factual support for their claim [of unconstitutional motive] to avert dismissal'"); *id.* at 1438 (Edwards, J., concurring) (noting that "the majority opinion is not unfaithful to the teachings of *Hobson*"). The logical conclusion is that *Martin* simply intended to restate the *Hobson* pleading requirement. Most certainly, there is nothing in *Martin* that shows an intent to replace *Hobson* with a more rigorous pleading standard.

Second, *Martin* was concerned with the *overall probative quality* of the plaintiff's evidence at the pleading stage, not with its characterization as direct or circumstantial. *Martin* characterized its heightened pleading standard as a "*[l]imitation* [] . . . on the range of inferences a trial court may draw," (not as a *prohibition* on the trial court's reliance on inferences), and illustrated the standard with examples from antitrust cases. *Id.* at 1435-36 (emphasis added). A review of the cited antitrust cases confirms that *not one of them* invokes a distinction between direct and circumstantial evidence. *See especially Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (permitting "direct *or circumstantial*" evidence to support an inference of conspiracy) (emphasis added), *cited in Martin*, 812 F.2d at 1436. *Martin* also concluded that "[the plaintiff's] fact recitations, as they now stand, are *insufficiently probative* of the alleged unconstitutional motive to warrant denial of the

---

limited discovery. *Martin v. D.C. Metropolitan Police Dep't*, 817 F.2d 144 (D.C. Cir. 1987) (en banc).

On its own motion, the court later denied rehearing *en banc*, *Bartlett v. Bowen*, 824 F.2d 1240, 1241 (D.C. Cir. 1987) (en banc), and reinstated the majority and dissenting opinions. In the statements attached to *Bartlett*, the debate over the precedential value of *Hobson* focuses not on the formulation or wording of the heightened pleading standard, but rather on whether a plaintiff should be permitted limited discovery for the purpose of meeting the heightened pleading standard announced in *Hobson*. *Id.* at 1245-46 (Ginsburg, R.B., J., concurring); *id.* at 1246 (Silberman, J., concurring); *id.* at 1249 (Bork, Starr, Buckley, Williams & Ginsburg, D.H., J.J., dissenting in a joint statement).

[defendants'] motion for summary judgment." 812 F.2d at 1436 (emphasis added); *but see id.* (noting that the plaintiff had produced no direct evidence of the defendants' unconstitutional motive). Needless to say, this focus on the probative quality of the evidence is entirely consistent with the pleading requirement in *Hobson*.

The distortion of *Hobson* can also be traced to *Whitcare v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), in which the court incorrectly opined that *Martin* "made clear that if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." *Id.* at 1171 n.4. *Whitacre* has no precedential weight, however, because the court in that case did not rely on the plaintiff's lack of direct evidence when it dismissed the plaintiff's claim. *Id.* at 1172.

The *Siegert* majority attempted to summarize and clarify the court's holdings in *Hobson*, *Martin* and *Whitacre*, but, in so doing, the majority mistakenly latched onto the "direct evidence" language in *Martin* and incorrectly concluded that,

> under this court's heightened pleading standard, in order to obtain even limited discovery, [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

Siegert, 895 F.2d at 802. Indeed, the *Siegert* majority insisted that the plaintiff must offer direct evidence of impermissible motive, contrasting "direct" with "circumstantial" evidence in at least two places in the opinion, *see. Id.* at 802, 803, even though there is no foundation for this pleading standard in either *Hobson* or *Martin* -- the two cases upon which *Siegert* principally relied.

Regrettably, the Supreme Court did not address the heightened pleading standard when it affirmed the court's

judgment in *Siegert*.[25] However, Justice Kennedy specifically wrote in a separate concurrence that he would "reject . . . the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring). Instead, Justice Kennedy wrote that a heightened pleading standard should require a plaintiff to "put forward specific, nonconclusory factual allegations which establish malice, or face dismissal." *Id.* In his dissent, Justice Marshall (joined by Justices Blackmun and Stevens) also stated that the court of appeals "erred in holding" that a plaintiff must proffer "*direct* evidence of the unconstitutional motive." *Id.* at 1800 (Marshall, J., dissenting). At least three justices of the current Supreme Court have therefore made plain that they believe that a "direct evidence rule" is error.

Following the Supreme Court's decision in *Siegert*, this court's application of the heightened pleading standard has floundered. In *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991), the panel held that "[t]he [heightened] pleading standard requires no more than that the plaintiff tell his story, relating the pertinent information that is already in his possession." *Id.* at 76 (citing to Justice Marshall's dissent in *Siegert* for analogous support). Shortly after *Hunter* was decided, in *Crawford–El v. Britton*, 951 F.2d 1314 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992), the court applied the *Hobson* formulation of the heightened pleading standard without reference to the direct evidence requirement in *Siegert*.[26] *Id.* at 1317 (quoting *Andrews v. Wilkins*, 934 F.2d 1267, 1269–70 (D.C. Cir. 1991) (quoting *Hobson*, 737 F.2d at 30)). *Crawford–El* also noted that *Hunter* had clarified the scope of this circuit's heightened pleading standard. *Id.* at 1322. If nothing else, *Hunter* and *Crawford–El* show that there is considerable confusion in this circuit

---

[25] The Supreme Court affirmed on the basis that the plaintiff's allegations, even if true, did not state a claim for the violation of any rights protected by the Constitution. *Siegert*, 111 S. Ct. at 1791.

[26] *Crawford–El* cited *Siegert*, *Whitacre*, and *Martin*, but made no reference to direct evidence. *Crawford–El*, 951 F.2d at 1317–18.

about the correct formulation of the heightened pleading standard.

To summarize, the heightened pleading standard, as originally formulated in *Hobson*, makes no mention of "direct evidence" and does not provide the basis of a pleading standard that requires direct, as opposed to circumstantial, evidence. The "direct evidence" language that forms the basis of the majority's holding today arose out of thin air in *Martin*, borrowed from a district court opinion that likewise conjured the language out of thin air. While the "direct evidence" language in *Martin* was reconcilable with the *Hobson* standard, subsequent cases such as *Whitacre* and *Siegert* have poured an unintended significance into the language that is fundamentally irreconcilable with the standard in *Hobson*.

Faced with an irreconcilable difference between two heightened pleading standards, a panel of this court is not free to overrule the original standard with a subsequent distortion of that standard. The pleading requirement in *Hobson* is binding precedent. *See Martin*, 812 F.2d at 1440 (Starr, J., dissenting in part) ("Even if one has latter-day doubts as to *Hobson* wisdom, the pleading requirement which it so clearly articulates is the law of this circuit. We are bound to follow it.").

III. THE DISTINCTION BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE

It is also incomprehensible to me why this court would want to adopt a test that compels plaintiffs to base their pleadings on "direct evidence" or suffer dismissal -- unless the court intends to eliminate all civil rights actions involving unconstitutional motive. As noted in *Harlow*, the purpose of the qualified immunity defense is to winnow out insubstantial claims before they reach discovery and trial. *Harlow*, 457 U.S. at 815-18. But the distinction between direct and circumstantial evidence is irrelevant to determining the likely merits of a claim.

It is indisputable that the probative value of circumstantial evidence, is "intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954), and can in some cases be "more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). Circumstantial evidence can be of high probative quality. For example, if one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence -- albeit wholly circumstantial -- that it snowed while one was asleep. Conversely, direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him. If Kimberlin supported his pleadings with one such affidavit, the majority would now be constrained to allow him to continue with his suit. I see no reason why this type of direct evidence should suffice to allow a plaintiff to proceed to discovery, when strong circumstantial evidence of a pattern of conduct that overwhelmingly supports an inference that the defendants acted with unconstitutional motive -- evidence that Kimberlin has proffered -- would not. Redress for violations of the Constitution surely should not rest on such flimsy distinctions.

It is also well-recognized that, in almost any claim involving motive, a defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive.[27] In criminal cases, for example, where the burden of proof is considerably higher than in a *Bivens* suit, this court and others have recognized that "[i]ntent may, and generally must, be proved circumstantially; normally, the natural probable consequences of an act may satisfactorily evidence the state of mind accompanying it." *United States v. Jackson*, 513 F.2d 456, 461 (D.C. Cir. 1975) (footnotes omitted).[28] Nor does this court distinguish between direct and circumstantial evidence when evaluating the sufficiency of the evidence in a criminal case. *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991) ("No distinction is made between direct and circumstantial evidence in

---

27 *United States v. Bank of New England, N.A.* 821 F.2d 844, 854 (lst Cir.) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."), *cert. denied*, 484 U.S. 943 (1987); *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984) ("Because intent is formed in the mind in secrecy and silence . . ., a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable."); *United States v. Pope*, 739 F.2d 289, 291–92 (7th Cir. 1984) ("Proof of the requisite state of mind need not be by direct evidence; it may be inferred from the surrounding fcts and circumstances."); *United States v. Hudson*, 717 F.2d 1211, 1213 (8th Cir. 1983) ("Willfulness, intent and guilty knowledge may also be proven by circumstantial evidence and frequently cannot be proven in any other way."); *United States v. Childs*, 463 F.2d 390, 392 (4th Cir.) ("Intent is not susceptible of direct proof; it must be proved by circumstances.") (footnote omitted), *cert. denied*, 409 U.S. 966 (1972); 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 411 (2d ed. 1982) ("Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the existence of a conspiracy, criminal intent, or other issues involving state of mind.") (footnotes omitted); 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 242, 244, 245 (Chadbourn rev. 1979) (intent, knowledge, belief, and state of mind may be evidenced by external circumstances and the defendant's conduct).

28 *See also United States v. Maggitt*, 784 F.2d 590, 593 (5th Cir. 1986) (same); *United States v. Harris*, 558 F.2d 366, 369 (7th Cir. 1977) (same); *United States v. White*, 557 F.2d 233, 236 (10th Cir. 1977) (per curiam) (same).

evaluating the sufficiency of evidence supporting a guilty verdict."), *cert. denied*, 113 S. Ct. 287 (1992); *see also United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984) (ruling that "circumstantial evidence alone can sustain a guilty verdict and that to do so, circumstantial evidence need *not* remove every reasonable hypothesis except guilt").

If circumstantial evidence suffices to prove intent beyond a reasonable doubt in a *criminal trial*, it should certainly satisfy this court's heightened *pleading* standard in a *civil* case. Indeed, to require plaintiffs to plead direct evidence of intent is to require plaintiffs to provide more evidence at the pleading stage than is required to win the case at trial. *See Crutcher*, 883 F.2d at 504 (rejecting direct evidence requirement because it would require plaintiff "to come forth with more evidence than she would have to produce to prevail on the merits"); *see also American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950) (noting that "courts and juries every day pass upon knowledge, belief and intent . . . having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred").

Given the recognized difficulty of proving intent by direct evidence, the effect of a direct evidence pleading requirement will be to prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances. In *Hobson*, for example, a 15-month "intensive" investigation by a Select Committee of the United States Senate turned up direct evidence that *two* of the five *Hobson* defendants had acted with intent to violate the plaintiff's civil rights. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, *supra* note 6, BOOK I, FOREIGN AND MILITARY OPERATIONS AT III. If a direct evidence requirement has been applied in *Hobson*, however, the complaints brought against the other three defendants would have been dismissed for lack of direct evidence of intent. *See supra* note 6 and accompanying text.

Justice Marshall recognized this effect in his dissenting opinion in *Siegert*. Justice Marshall wrote that, "[b]ecause evidence of [unconstitutional] intent is peculiarly within the control of the defendant, the 'heightened pleading' rule employed by the Court of Appeals effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim." *Siegert*, 111 S. Ct. at 1800–01 (Marshall, J., dissenting). Two other circuits have wisely rejected a heightened pleading standard that requires direct evidence for this very reason. *Branch*, 937 F.2d at 1386-87 (9th Cir.) ("Because evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal."); *Elliott*, 937 F.2d at 345 (7th Cir.) ("Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed."); *see also Siegert*, 895 F.2d at 806 (Wald, C.J., dissenting in part) ("The policy of requiring specific, direct evidence of the defendant's unconstitutional intent, when unflinchingly applied to all cases in which a qualified immunity defense is raised, effectively cuts off both bona fide and ill–motivated suits.").

A pleading standard that effectively precludes all *Bivens* actions that involve unconstitutional motive is a cynical perversion of this court's responsibility to strike a balance between the "evils inevitable" in resolving immunity questions–the evil of shutting out meritorious civil rights claims, and the evil of exposing Government officials to the burdens of litigation and liability. *Harlow*, 457 U.S. at 813-14. And, because the direct evidence requirement effectively precludes an entire class of civil rights claims, it stands in flat contradiction with the dictates of *Bivens* itself, which reaffirmed the notion that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). As both Justice Kennedy and Justice Marshall indicated in *Siegert*, there is "no warrant for . . . a [direct evidence] rule

as a matter of precedent or common sense." *Siegert*, 111 S. Ct. at 1801 (Marshall, J., dissenting); *id.* at 1795 (Kennedy, J. concurring) ("Circumstantial evidence may be as probative as testimonial evidence.").

IV. CONCLUSION

In an admonition all too prescient, the *Hobson* panel cautioned the court against applying its heightened pleading requirement too rigidly, lest it result in the dismissal of meritorious claims. *Hobson*, 737 F.2d at 30–31. But this is exactly what has happened in this case. We must not lose sight of what has happened here. A citizen of the United States suggested to the media that he had damaging information about the candidate for the second-highest executive position in our democracy. Just days before the election, he was twice placed in "administrative detention," where he was effectively precluded from sharing his story with an understandably curious media. While we might expect such official action not to raise eyebrows in a country with fewer guarantees of civil liberty, such action is unfathomable in this country under our constitutional system of government. I simply cannot imagine that the judiciary of the United States will shut the doors of the courthouse and refuse to allow Kimberlin's suit to proceed for the specious reason that his complaint is based on circumstantial evidence.

I dissent.

APPENDIX B

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

Issued: August 6, 1991

No. 91-5315

BRETT C. KIMBERLIN,
Plaintiff,

v.

MICHAEL J. QUINLAN, *et al.*,
Defendants.

OPINION

This suit charges that, in the fall of 1988, just prior to the presidential election, the plaintiff, at that time an inmate at the El Reno Federal Correctional Institution in Oklahoma,[1] contacted national and local journalists to inform them that in 1971 he had sold marijuana to Dan Quayle, then a candidate for and now Vice President of the United States. The complaint further alleges that plaintiff was prevented from speaking to the journalists by being placed in an isolation cell, and that he was subsequently retaliated against when he persisted in his attempts to

---

[1] Plaintiff is now incarcerated in Tennessee, serving a lengthy prison sentence for offenses involving drug smuggling and the use of explosives.

contact the press. The action is now before the Court on defendants' motions to dismiss.[2]

I. FACTUAL BACKGROUND

According to the complaint, Kimberlin was interviewed by NBC News on the afternoon of Friday, November 4, 1988, four days before the presidential election, and he was scheduled to have another interview, this time with a group of reporters, at 7:00 p.m. that same day. However, before the second interview could take place, defendant J. Michael Quinlan, the Director of the Bureau of Prisons, cancelled the meeting and ordered Kimberlin to be placed in administrative detention[3] where he remained until the next day. Two days after that, on Monday, November 7, the day before the presidential election, Kimberlin planned to address a conference of reporters in Washington, D.C. via telephone, but in the morning of that day he was again placed in detention, this time to be kept for seven days, until November 14. Kimberlin was placed in detention a third time, from December 22 until December 23, 1988.

Based on these events, Kimberlin has filed *Bivens*[4] actions against two government officials, Bureau of Prisons Director Quinlan, and Loye W. Miller, Jr., at the time Director of Public Affairs of the Department of Justice, in their individual capacities, for violating his rights under the First and Fifth Amendments. It is plaintiff's claim that it was the defendants' purpose, when issuing or participating in the issuance of the first two detention orders, to prevent him from informing the press prior to the election about his transactions with Dan Quayle, and that the third detention was ordered in retaliation for his previous contacts with the

---

2 One of the motions is for dismissal or for summary judgment.

3 The removal from the general prison population is variously referred to herein as detention, administrative detention, placement in an isolation cell, or administrative segregation.

4 *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

press. In their motion papers, the defendants contest plaintiff's claims. Specifically, they assert that Kimberlin's first detention was effected for his own safety, and that the second and third detentions were ordered because the correctional authorities were investigating whether he had violated prison rules against making third-party telephone calls.[5] Defendants' Statement of Material Facts at 2-4.

In addition to the *Bivens* suit, Kimberlin has filed an action under the Federal Tort Claims Act (FTCA) against the United States and against Mr. Quinlan in his official capacity. It is charged in that action that the three detentions amounted to false imprisonment, and that Kimberlin's treatment by prison guards while he was in detention constituted assault and battery. Kimberlin also claims that prison officials monitored his telephone calls in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Pending before the Court at this time is a motion by the defendants in their individual capacities to dismiss or for summary judgment in the *Bivens* action, and a motion by the government and by Director Quinlan in his official capacity to dismiss the Federal Tort Claims Act and Title III actions.

II. ESTABLISHED CONSTITUTIONAL RIGHTS

Kimberlin's First Amendment *Bivens* claim hinges in large part on the motive of the government officials for placing him in administrative detention. While officials such as Quinlan and Miller have qualified immunity against suit, a plaintiff will prevail notwithstanding that immunity if he is able to prove that the officials were motivated by a purpose to violate rights that were clearly established at the time of the conduct in question. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Martin* v. *D.C. Metro. Police Dep't.*, 812 F.2d 1425, 1431-33, *vacated in part on other grounds*, 817 F.2d

---

[5] A third-party call is a call placed to one person, who then uses a conference-line or call-forwarding capability to contact a person at another telephone number.

144, *en banc reinstated sub nom. Bartlett on behalf of Neuman* v. *Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

For purposes of analysis, it is useful to determine first whether the conduct alleged by Kimberlin in light of the officials' alleged motivation violated a right that was clearly established at the time the conduct is alleged to have occurred. On that issue, the general rule is that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

Defendants argue that prison inmates do not have a right either to face-to-face press interviews or to telephonic press conferences, and that defendant's actions therefore did not violate plaintiff's rights under the First Amendment. It would follow, of course, that such a right was not clearly established at the time of the events in question.

However, plaintiff is not claiming that there is or was a general Bureau of Prisons policy banning these methods of press contact, or that such a policy, if it existed, would violate the First Amendment rights of inmates. Rather, it is his contention that the prison officials cancelled one previously approved face-to-face interview, prevented him from conducting other telephonic interviews, and retaliated against him for his previous contacts with the press -- all not because these activities contravened a general prohibition on contacts with the press but because of the content of what he was expected to say to the journalists.

It was clearly established in November 1988 that, absent special circumstances, federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech. As early as 1975, the Court of Appeals for the Third Circuit ruled explicitly that the First Amendment prohibits prison officials from granting or denying a prisoner's interview with the press based on the content of

that interview. *Main Road* v. *Aytch*, 522 F.2d 1080, 1086-87 (3d Cir. 1975), where the court stated that the "First Amendment precludes [a prison official] from regulating, through the grant or denial of permission for prisoners to talk with reporters, the content of speech which reaches the news media, unless the restriction bears a substantial relationship to a significant governmental interest."

The Supreme Court decided about the same time that a prison regulation that restricts prisoners' contact with the press is valid but only "[s]o long as this restriction operates in a neutral fashion, without regard to the content of the expression." *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). And it has likewise been decided that a prison regulation that operates in the area of inmates' First Amendment rights must have some rational connection with a legitimate governmental interest, and that regulation must "operate[] in a neutral fashion, without regard to the content of the expression." *Turner* v. *Safley*, 482 U.S. 78, 89-90 (1987) (upholding ban on prisoner-to-prisoner correspondence in part because it was content-neutral). *See also, Bell* v. *Wolfish*, 441 U.S. 520, 551 (1979) (upholding content-neutral regulation requiring that hard cover books be sent only by publishers).[6]

In sum, if the officials were motivated by a purpose to keep Kimberlin from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attached to their actions.

III. HEIGHTENED PLEADING REQUIREMENTS

The next issue revolves around the motivation of the defendants: did they intend to keep Kimberlin from speaking to the press because they were concerned about

---

[6] An inmate also has a well-established right to be free from retaliation based on the content of his previous interviews with the press. *Burnham* v. *Oswald*, 342 F. Supp. 880, 889 (W.D.N.Y. 1972); *Brooks* v. *Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987); *Cavey* v. *Levine*, 435 F. Supp. 475 (D. Md. 1977), *aff'd without opinion*, 580 F.2d 1047 (4th Cir. 1978).

what he might say? That issue must be examined from two perspectives: first, did the allegations of First Amendment violations in plaintiff's papers comply with the heightened pleading requirements established in this Circuit with respect to claims of this type?, and second, were plaintiff's allegations concerning defendants' intent or motive substantively sufficient to withstand defendants' motion to dismiss? In this section of the opinion, the Court examines the law respecting the heightened pleading requirement; in the next section, it considers the facts as they are alleged by plaintiff to determine their sufficiency under that pleading requirement and in light of the motion to dismiss as such.

The defendants argue that they should not be subjected to discovery and required to undergo a trial on the basis of mere general allegations of wrongdoing, and that is certainly correct. *See Whitacre* v. *Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989); *Hobson* v. *Wilson*, 737 F.2d 1, 29, (D.C. Cir. 1984). The law is, at least in this Circuit, that a plaintiff who makes a *Bivens* claim which alleges unconstitutional motive must meet what are called heightened pleading requirements when he is faced with a motion to dismiss. *Siegert* v. *Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 111 S. Ct. 1789 (1991). Because the decision of the Court of Appeals in the *Siegert* case is central to a proper disposition of this part of the government's motion, it needs to be analyzed in some detail.

Siegert, a former employee of the federal government at St. Elizabeth's Hospital in Washington, D.C., brought a *Bivens* action alleging that his former superior had deprived him of liberty without due process by writing an allegedly defamatory letter in response to an inquiry by Siegert's prospective new employer. As in this case, the defendant moved for dismissal, or in the alternative for summary judgment, based on the defense of qualified immunity under *Harlow* v. *Fitzgerald, supra*. The District Court denied the motion and ordered limited discovery; the defendant appealed, and the Court of Appeals reversed.

The appellate court, after first assuming without deciding that a violation of the plaintiff's constitutional rights had been adequately alleged, went on to hold that the plaintiff had failed to satisfy the heightened pleading standard required in cases of that kind. In this regard, the court stated that, upon the assertion of a qualified immunity defense the plaintiff will face dismissal unless he comes forward with specific factual allegations which establish improper intent. This ruling, of course, raises the question of precisely what kind of factual pleading or record is required. On that issue, the *Siegert* opinion is susceptible of more than one interpretation, as follows.

The majority of the Court of Appeals used several different formulations regarding the necessary requirement. At one place in the opinion, the court juxtaposed "direct" evidence with "circumstantial" evidence, stating that "merely circumstantial evidence of the intent" is insufficient to entitle a plaintiff to discovery. 895 F.2d at 802. Other language, however, contrasts "direct" evidence of an impermissible motive not with circumstantial evidence of such a motive, but with "conclusory" evidence or allegations (895 F.2d at 802), and it indicates that something "more tangible [in] the record" is required than "conclusory" allegations (895 F.2d at 804).

In short, at times the *Siegert* court states that allegations and evidence that are *circumstantial* will not suffice to satisfy the heightened pleading requirement, while elsewhere it suggests that it is *conclusory* allegations or evidence that are not enough. As will be seen below, in the present circumstances the two concepts cannot be considered identical. Moreover, although in *Siegert* the equation of circumstantial evidence with conclusory evidence[7] was immaterial to the outcome, in this case the distinction between these concepts is crucial, for as discussed below, while the record before the Court on the

---

7 Similarly, the court equated direct or tangible evidence with nonconclusory evidence.

key issue of defendants' motive is circumstantial, it is also tangible and far from being merely conclusory.

Other judges involved with the *Siegert* case have expressed varying views on the meaning of the Court of Appeals' *Siegert* opinion. Thus, Judge Wald, the *Siegert* dissenter, expressed the belief that the heightened pleading standard, as formulated by the majority in that case, requires the plaintiff to plead "nonconclusory" facts (895 F.2d at 805) although elsewhere in her dissent, Judge Wald speaks of a requirement of more than "inferential or circumstantial" support for the unconstitutional motive allegations (895 F.2d at 807).

The Supreme Court did not rest its affirmance of the Court of Appeals on the issue of a heightened pleading requirement.[8] However, the majority opinion authored by Chief Justice Rehnquist construed the Court of Appeals opinion both as requiring "direct . . . as opposed to merely circumstantial" evidence and as requiring something "more tangible" than the plaintiff's affidavits. 111 S. Ct. at 1792-93. Justice Kennedy, in a separate concurrence, construed the Court of Appeals opinion as requiring "specific, nonconclusory factual allegations," but he went on to state his disagreement with what he regarded as the Court of Appeals' requirement of "direct, as opposed to circumstantial, evidence." 111 S. Ct. at 1795. Justice Marshall's dissenting opinion interpreted the Court of Appeals opinion as requiring "*direct* evidence of the unconstitutional motive," contrasting that with what he regarded as Siegert's "highly specific circumstantial evidence" of such a motive. 111 S. Ct. at 1800, 1801 (emphasis in original).

Finally, the Solicitor General, in his brief to the Supreme Court in *Siegert*, stated that he did not believe that the opinion of the Court of Appeals "which focused

---

[8] Instead, the Supreme Court held that the plaintiff's allegations, even if true, did not state a claim for violation of any constitutional right. 111 S. Ct. at 1794.

primarily on the conclusory nature of petitioner's assertions," was in conflict with prior Supreme Court law holding (in *Holland* v. *United States*, 348 U.S. 121, 140 (1954)), that circumstantial evidence is intrinsically no different than direct evidence.[9] Brief at pp. 20-21 n.13.[10]

This Court has concluded, on the basis of the analysis *supra*, that Kimberlin meets the heightened pleading requirement established by *Siegert*, as long as the complaint, together with the supporting exhibits before the Court, present allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial). That is so because *Siegert* does not appear to have turned on the distinction between direct and circumstantial evidence as understood in the law of evidence, but on the question whether the plaintiff had proffered something other than mere conclusions, namely tangible allegations of concrete

---

[9] The Solicitor General's view is supported, in addition to *Holland*, by a number of other precedents. *See, e.g., United States* v. *Clark*, 506 F.2d 416, 418 (5th Cir. 1975) (the law makes no distinction between the weight to be given either to direct or to circumstantial evidence); *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (circumstantial evidence is not only sufficient but may be more certain, satisfying and persuasive than direct evidence).

These principles are particularly apt where, as here, state of mind is at issue. *United States* v. *Jackson*, 513 F.2d 456, 461 (D.C. Cir. 1975) ("Intent may, and generally must, be proved circumstantially . . . ."); *United States* v. *Eaglin*, 571 F.2d 1069, 1076 (9th Cir. 1977) (intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind). In view of these legal principles, it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness.

[10] In the same vein, the Solicitor General went on to construe the Court of Appeals as holding in *Siegert* only that the plaintiff "may not rely solely on subjective allegations, . . . attenuated inferential and circumstantial allegations, . . . or otherwise conclusory allegations . . . to support a claim of improper motive." Elsewhere his brief stated that it was not necessary to a resolution of the case by the Supreme Court to distinguish between circumstantial and direct proof as those terms are applied in the law of evidence.

facts corroborative of his own subjective version of the events.

The Court will now turn to the allegations and the exhibits and examine them both under the *Siegert* pleading requirement and in relation to the broader issue raised by the motion to dismiss: whether a motive to deprive plaintiff of his constitutional rights has been properly asserted.

IV. INTENTION OF THE OFFICIALS

It is plaintiff's contention that two of his administrative detentions were caused by the Bureau of Prisons' concern that he would speak to the press about his alleged sale of marijuana to then candidate Dan Quayle, and that the third detention constituted retaliation against him for having done so. The defendants argue in response that there were legitimate institutional reasons for the detentions, and that suppression of Kimberlin's speech regarding his alleged experiences with Dan Quayle had nothing to do with the measures taken. Plaintiff has replied in essence that the institutional reasons advanced by the defendants were mere pretexts. If plaintiff is correct in that conclusion, it would tend to show, circumstantially yet in tangible and persuasive fashion, that the defendants had the intent or motive requisite for a *Bivens* action. The Court will now examine the three Kimberlin detentions in that light.

First. According to defendants, Kimberlin was placed in administrative detention on November 4, 1988, in order to ensure his safety. That Bureau of Prisons concern, in turn, was asserted to have been triggered by statements from Loye Miller, Director of Public Affairs at the Department of Justice, to the effect that he had been advised by Nina Totenberg, a reporter for National Public Radio, of a Kimberlin complaint to her that his safety was in jeopardy. However, according to a sworn declaration of Ms. Totenberg, she "had never said any such thing," and she had so informed Miller.[11]

---

[11] Exh. 4 to Plaintiff's Opposition, p. 2. Further, according to Ms. Totenberg, Kimberlin had told her by telephone on November 4 that he

Plaintiff further notes that, as the Bureau of Prisons concedes, Director Quinlan personally ordered Kimberlin's administrative detention, Exh. 1 to Plaintiff's Opposition, p. 2, and that this was the first time that the Director, who oversees some 45,000 federal inmates nationwide, had made a decision to place an inmate in one of the many institutions under his control in administrative detention. Exh. 8, p. 9. Plaintiff contends that this extraordinary event corroborates his claim that the detention decision was not a routine security measure.[12]

Quinlan also personally cancelled Kimberlin's press conference. There is some question even from the defense side as to why he did that. Quinlan explained to Senator Joseph Biden that the holding of such a press conference was contrary to Bureau of Prisons policy. Exh. 3, p. 2. However, Miller has apparently stated that Kimberlin was "within his rights to have one according to the rules and regulations." Exh. 11, p. 73.

In his effort to show that his detention was not ordered out of concern for his safety, Kimberlin alleges next that, to get him to the detention cell, he was wrestled from his room, handcuffed, marched to detention in a painful position, and strip searched, the point being that these measures are inconsistent with administrative segregation as a protection for his own safety.

Plaintiff finally relies on the fact that Miller was in continuous contact with Mark Goodin, Deputy Press Secretary to the Quayle campaign who, among other things, stated to Miller that Kimberlin's claims had to be taken seriously on account of its potential for adverse publicity;

---

was concerned "about what the Justice Department might do to him." He was placed in administrative detention within an hour of his conversation with her. *Id*.

[12] Along the same line, plaintiff notes that Miller discussed the Kimberlin efforts to talk to the press with the Executive Assistant to the Attorney General (and would have discussed it with Attorney General Thornburgh himself had Thornburgh not been out of town). Exh. 5, p. 2.

that he, Goodin, planned to be present with Quayle the day before the election to handle media inquiries regarding this subject; and that the closer to the election the story were to break the better the chance that it would have adverse effects. Exh. 5, p. 4; Exh. 11, p. 22. Here again, it is plaintiff's claim that attention would not have been paid to him at these high levels if nothing more than his own safety at an institution in Oklahoma had been at issue.

Second. As indicated, Kimberlin was released on November 5, but he was again placed in administrative detention on November 7, the day before the election. In the meantime, his phone conversations were monitored, First Amended Complaint at 14, and by this means the officials had learned that on that day Kimberlin proposed once again to telephone a group of reporters. Exh. 4, pp. 3-4, Exh. 5, p. 4. But that call was never made, for Kimberlin was placed in detention before it could be made. That detention, like the previous one, was also ordered personally by Director Quinlan. Exh. F to First Amended Complaint.

The justification given by the Bureau of Prisons for the second detention was that Kimberlin had made a third-party call.[13] However, plaintiff claims the pertinent regulations do not contemplate segregation as a sanction for making a third-party call;[14] and Miller said that Kimberlin's second detention was a consequence of his intention to hold another press conference. Exh. 8, p. 9.

Third. Defendants justify Kimberlin's third detention, that of December 22, 1988, on the same basis as the second one, that is, that he had made a third-party call. But here again, there was no hearing and finding of guilt of

---

13 *See* note 5, *supra*.

14 Further, an inmate may be placed in administrative detention pending investigation of alleged violation of prison regulations only "when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution." 28 C.F.R. § 541.22(a). Kimberlin apparently was not at any pertinent time period regarded as a serious threat in any of these respects.

the infraction prior to the detention as may be required by the regulations, and Kimberlin ultimately was found not guilty of misuse of the telephone. Plaintiff's claim that this detention was retaliatory or deterrent rests essentially on the timing of the event in that it occurred within a few days after press articles appeared concerning his problems at the institution on account of his contacts with the press. *See, e.g.*, Exh. F to First Amended Complaint (*New York Times* article dated December 20, 1988).

On the basis of these specific factual allegations, the Court concludes that the claims of constitutional violations made by plaintiff are (1) adequate to comply with the heightened pleading requirement of *Siegert*, and (2) otherwise sufficient to overcome defendants' motion to dismiss.

This obviously is not a final decision on the merits. The Court is not called upon at this time to determine whether, and it does not decide that, any particular claim made on behalf of plaintiff is true.[15] As noted, Quinlan, Miller, and others have provided their own explanations for the events upon which plaintiff relies, and several of these explanations are sharply at odds with those provided by plaintiff. It may be expected that defendants will hereafter provide more detailed evidentiary support for their version of the events. The Court only holds that plaintiff's allegations are sufficiently tangible, detailed, and nonconclusory that they support his request for a denial of the motion to dismiss or for summary judgment.

Accordingly, the motion will be denied, the lawsuit may proceed, and plaintiff will be afforded the right to further discovery.

---

[15] Similarly, the Court's decision on the motion to dismiss does not constitute any ruling with regard to Kimberlin's claim that he had sold marijuana to Dan Quayle. Indeed, even if the defendants' motivation was as plaintiff says it was, it would not necessarily prove that there was a sale of marijuana; the defendants could have desired to keep the Kimberlin allegations from the press and the public just prior to the election whether or not they were true.

V. FIFTH AMENDMENT CLAIMS

Plaintiff next claims that Quinlan and Miller violated his Fifth Amendment rights to substantive and procedural due process.

First. Not much need be said regarding substantive due process for, as defendants correctly argue, a violation in that regard must be viewed not under the rubric of generalized due process notions but in accordance with an explicit textual source of constitutional protection. *Graham* v. *Connor*, 490 U.S. 386, 393-95 (1989). This means that plaintiff's substantive due process claim depends upon and is coextensive with his First Amendment claim. The Court has denied defendants' motion to dismiss that claim, and it accordingly survives. No purpose would be served by a consideration in this case of two First Amendment claims, one directly and the other indirectly by way of the Fifth Amendment. On this basis, the motion to dismiss the Fifth Amendment substantive due process claim will be granted.

Second. With regard to the procedural due process claim, the mandatory language in the Federal Bureau of Prisons regulations on administrative detention (28 C.F.R. § 541.22) grant Kimberlin a liberty interest in remaining free from an administrative detention that is effected without compliance with these regulations. *See Hewitt* v. *Helms*, 459 U.S. 460 (1983). However, the only procedure that was due Kimberlin under the circumstances presented by this case was an informal, non-adversary review of the basis for his detentions within a reasonable time after they began. *Hewitt, supra*, 459 U.S. at 472.

As indicated above, Kimberlin was detained on three occasions. Two of the detentions (November 4-5; and December 22-23) were of very short duration. In both instances, he was released within twenty-four hours of being detained. The Court finds that under the *Hewitt* standard, Kimberlin was released with sufficient dispatch on both of these occasions, and that whatever review the prison officials provided conformed to *Hewitt*.

As concerns the remaining detention, that of November 7, the complaint alleges that Kimberlin was released after seven days, when a local disciplinary hearing officer determined that the alleged violation did not carry the sanction of segregation from the general prison population. First Amended Complaint at 17. This decision by the officer was likewise sufficiently speedy for due process purposes. See *Hewitt, supra,* where the Supreme Court held that prison officials are to be accorded wide-ranging deference in the adoption of policies and practices that, in their judgment, are needed to preserve prison order and discipline. The Court went on to say that such officials are obligated only to engage in an informal review of the information supporting the inmate's administrative confinement "within a reasonable time after confining him to administrative segregation." 459 U.S. at 472. It so happens that the inmate in *Hewitt* did not receive even an informal review until five days after his administrative detention, and that he remained in that detention for a considerable period thereafter. Nevertheless, the Supreme Court approved the actions of the officials. Under the standards established by the Supreme Court, Kimberlin was not deprived of procedural due process.

For the reasons stated, the Fifth Amendment claims will be dismissed.

VI. FEDERAL TORT CLAIMS ACT

Plaintiff next claims that he is entitled to damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 1402(b), 2671 *et seq.*[16] This entitlement is claimed to be based on his false imprisonment and the assault and battery, stemming from Director Quinlan's order that he be placed in administrative detention, and his handling by the prison guards while they took him to that detention. The government has moved to dismiss these claims on the basis of improper venue.

---

16 Plaintiff has satisfied the administrative claim requirements of the Federal Tort Claims Act.

The statute lays venue of FTCA claims only in the "district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). Since plaintiff does not reside in the District of Columbia, the issue is whether, under the standards established by cases, the acts complained of may be said to have occurred in this District.

The government relies principally upon *Reuber* v. *United States*, 750 F.2d 1039 (D.C. Cir. 1984). In that case, where a letter of reprimand concerning the plaintiff was written and circulated in Maryland, the Court of Appeals held venue in the District of Columbia to be improper even though it appeared that the letter was eventually leaked and posted on a bulletin board in this District. The court reached that result because the plaintiff could "point to *no act* in the District by *any government employee* that caused him any tortious injury," 750 F.2d at 1046-47 (emphasis added).[17]

In the view of this Court, *Reuber* is not dispositive of the venue issues here. Unlike in that case, the plaintiff here has claimed that officials and other employees of the United States committed acts in this District that caused him injury. Specifically, the complaint alleges that Kimberlin was falsely imprisoned, *i.e.*, placed in administrative detention, as a result of a conspiracy led by Director Quinlan in Washington, D.C. While the allegation of a conspiracy including officials in Washington would not, by itself, be sufficient to confer venue here,[18] the conspiracy allegation is here fleshed out with respect to the alleged false imprisonment by specific claims that Quinlan personally ordered Kimberlin held in administrative detention on November 4 and 7, 1988; that Quinlan falsely informed regional Bureau of Prisons officials that Kimberlin had told a member of the press that his life was in danger; and that

---

[17] The events in the District of Columbia could have been entirely the work of private persons, not connected with the government, and the United States therefore could not be held responsible in a FTCA claim.

[18] Conspiracy allegations are often made, particularly by inmates, even when there is no factual basis therefor.

Quinlan on November 7, 1988 approved and ratified Kimberlin's second administrative detention.[19]

In short, Kimberlin's papers allege that the impetus for his administrative detentions came from Washington, D.C., where Director Quinlan ordered that Kimberlin be detained. Based on these allegations, the Court finds that there is a sufficient nexus between the false imprisonment claim and the District of Columbia for venue to be proper here with respect to that claim.

On the other hand, the Court concludes that venue does not lie in the District of Columbia with respect to the assault and battery claim. To be sure, plaintiff argues in his opposition to the motion to dismiss that the facts alleging false imprisonment are closely intertwined with those alleging assault and battery, and that "[i]n ordering Kimberlin into confinement, Quinlan [in Washington] is responsible for the foreseeable consequences of his actions, including the assault and battery . . . ." Memorandum in Opposition at 16 n.5. The present situation involves a statutory waiver of sovereign immunity; that waiver specifies precisely in which courts venue is proper; and the venue provision must therefore be strictly construed. The Court will not conclude that venue is appropriate in this District on the assault and battery charges, since in essence the plaintiff is relying only on the presence here of alleged conspirators and on implications arising from claimed foreseeability.[20] For these reasons, the motion to dismiss will be denied with respect to the FTCA false imprisonment claim but granted with respect to the assault and battery claim.

---

[19] There are also additional allegations which could conceivably support venue here, but their relationship to individuals in the District of Columbia is at this juncture not sufficiently clear.

[20] It is quite possible that the prison guards were acting on their own when they allegedly roughed up Kimberlin in the course of his transfer to administrative detention. The complaint does not allege otherwise. Certainly, the Court is unable, without more, to assume foreseeability insofar as Quinlan is concerned.

VII. CLAIMS UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Kimberlin finally claims that prison officials monitored his use of the telephone, and that this monitoring violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. § 2511. The Title III claim names Director Quinlan and the Bureau of Prisons as defendants. While the government argues to the contrary, it is established that Title III applies to prisons and prison inmates. *United States* v. *Amen*, 831 F.2d 373, 378 (2d Cir. 1987); *Campiti* v. *Walonis*, 611 F.2d 387, 392 (1st Cir. 1979); *compare United States* v. *Paul*, 614 F.2d 115, 117 (6th Cir. 1980).

The government also contends that Kimberlin consented to the monitoring of his phone calls by using prison phones, *see Amen*, 831 F.2d at 378; *Paul*, 614 F.2d at 117; 18 U.S.C. § 2511(2) (c), and that the monitoring was valid under the statute because it was performed by a "law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5) (a).

Consent may be implied, the government argues, from the fact that Kimberlin had constructive notice of the monitoring, because the Code of Federal Regulations authorizes telephone monitoring in prisons. 28 C.F.R. § 540.101. But that same regulation requires the warden to "provide notice to the inmate of the potential for monitoring." Under the circumstances of this case, the Court will not infer consent unless it can be shown that the warden gave notice to Kimberlin, alone or in conjunction with others, that the monitoring system was in place. Accordingly, before the Court would be justified in dismissing this claim, there would have to be a factual record on the notice question. Similarly, a factual record will have to be made on the issue of whether the monitoring of Kimberlin's calls occurred in the "ordinary course" of law enforcement duties. *Paul*, 614 F.2d at 117.

The motion to dismiss with respect to the Title III claim will therefore be denied, but that denial will be without prejudice to the filing of a motion for summary judgment upon the development of a further factual record.

August 6, 1991

HAROLD H. GREENE
United States District Judge

ORDER

In accordance with the opinion issued this 6th day of August 1991, it is

ORDERED That the motion to dismiss or for summary judgment on plaintiff's First Amendment claims be and it is hereby denied, and it is further,

ORDERED That the motion to dismiss or for summary judgment on plaintiff's Fifth Amendment claims be and it is hereby granted, and it is further,

ORDERED That the motion to dismiss plaintiff's Federal Tort Claims Act (FTCA) claim for false imprisonment be and it is hereby denied, and it is further

ORDERED That the motion to dismiss plaintiff's FTCA claim for assault and battery be and it is hereby granted, and it is further

ORDERED That the motion to dismiss plaintiff's claim under the Omnibus Crime Control and Safe Streets Act be and it is hereby denied without prejudice, and it is further

ORDERED That this Court's June 14, 1991 protective order preventing depositions of defendants Quinlan and Miller be and it is hereby dissolved.

HAROLD H. GREENE
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued: April 1, 1994

No. 91-5315

BRETT C. KIMBERLIN,
Appellee,

v.

MICHAEL J. QUINLAN, *et al.*
Appellants.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 90-01549)

On Appellee's Suggestion For Rehearing *In Banc*

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH and ROGERS, *Circuit Judges*

ORDER

Appellee's Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Therefore, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

For the Court:

Ron Garvin, Clerk

Circuit Judges SENTELLE and ROGERS did not participate in this matter.

Chief Judge MIKVA and *Circuit Judges* WALD, EDWARDS and RANDOLPH would grant the suggestion.

A statement of *Circuit Judge* WILLIAMS, joined by *Circuit Judges* SILBERMAN and BUCKLEY, and a statement of *Circuit Judge* SILBERMAN, concurring in the denial of rehearing *in banc*, are attached.

A statement of *Circuit Judge* EDWARDS, joined by *Chief Judge* MIKVA and *Circuit Judge* WALD, dissenting from the denial of rehearing *in banc* is also attached.

WILLIAMS, *Circuit Judge*, concurring in the denial of rehearing *in banc:* The imperfections of our "direct evidence" rule are plain to see. *Kimberlin v. Quinlan*, 6 F.3d 789, 798 (D.C. Cir. 1993) (Williams, J., concurring). But it represents our effort, most expressly stated in *Seigert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), to reconcile the extension of *Bivens* liability to

constitutional torts based on motive, see, e.g., *Davis v. Passman*, 442 U.S. 228 (1979), with the Supreme Court's determination in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that qualified immunity should afford officials substantial protection not merely from ruinous financial liability, but also from the burdens of litigation, including the burdens of discovery. *Id.* at 814-19.[1] It was, of course, precisely because of the Court's recognition that "questions of subjective intent so rarely can be decided by summary judgment", *id.* at 816, that it reformulated qualified immunity in *Harlow* to exclude subjective intent. There may well be better reconciliations than the "direct evidence" rule, ranging from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent. Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money. Indeed, as Justice Harlan observed in *Bivens* itself, the "range of policy considerations" to be taken into account is "at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). As existing precedents and our status in the judicial hierarchy preclude us from adopting many of these solutions, it seems to me on balance

---

[1] Although our "direct evidence" rule is a variation on what is often referred to as a "heightened pleading" standard, in fact the "standard" normally has nothing to do with pleading, but simply allows summary judgment to be granted before the plaintiff has had as great an opportunity to subject defendant to discovery as is conventionally available. See *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991); see also *Crawford-El v. Britton*, 951 F.2d 1314, 1320-21 (D.C. Cir. 1991) (relying on numerous attachments and affidavits); but cf. *Hunter v. District of Columbia*, 943 F.2d 69, 76 (D.C. Cir. 1991).

preferable to continue with the imperfections of *Seigert* until the Supreme Court resolves the issue.

SILBERMAN, *Circuit Judge*, concurring in the denial of rehearing *en banc*. I very much appreciate Judge Edwards' endorsement of my views as to the core ingredient of judicial restraint--avoidance of judicial policymaking, policymaking often exercised in pursuit of such elusive goals as "justice," a tranquil population, or the rearrangement of our society through the discovery of new constitutional rights for favored groups or individuals. He overlooks the point, however, that Justice Harlan made when he concurred in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring), and which the whole Court has subsequently endorsed. *See Busc v. Lucas*, 462 U.S. 367, 376-78 (1983). Recognizing with commendable candor that the Court had itself created a cause of action that neither the Constitution nor Congress had fashioned, Justice Harlan emphasized the open policymaking role that the Court has assumed. *See Bivens*, 403 U.S. at 407-10. And in a series of cases since *Bivens*, the Supreme Court and the lower federal courts have struggled with the costs and benefits of a *Bivens* action, perhaps more openly resembling legislatures than courts normally do. *See Busch*, 462 U.S. at 378; *Hubbard v. EPA Administrator*, 809 F.2d 1, 9 (D.C. Cir. 1986), *adhered to on reh'g en banc sub nom. Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (per curiam).

Those who criticize this circuit's direct versus circumstantial evidence distinction, which stems from *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1435-36 (D.C. Cir. 1987), have a logical point, but it is a point that focuses on the trees rather than the forest. As Judge Williams suggests, the Supreme Court is better positioned than we to resolve the broader problem, and, in the meantime, it can hardly be thought "an extraordinary use of judicial authority" to rest on our precedent.

Of course, in *Bivens* cases, individual government officers are sued personally, and are sometimes obliged to pay attorneys fee out of modest government salaries. That is why the Court has recognized that early dismissal of all but the few obviously meritorious cases is desirable. Apparently, the wisdom of that proposition is easier for some judges to perceive when the potential defendants are part of the judiciary. See *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990), in which no judge dissented from the denial of rehearing.

EDWARDS, *Circuit Judge*, with whom *Chief Judge* MIKVA and *Circuit Judge* WALD concur, dissenting from the denial of the suggestion for rehearing *en banc:* The panel majority in this case relied on a rule that distinguishes between "direct" and "circumstantial" evidence in reversing the District Court and dismissing the plaintiff's suit for failure to satisfy so-called "heightened pleading" requirements. In response to plaintiff's petition for *en banc* review, and after consultation with the Solicitor General's office, the Government notified the court that it would not defend the "direct evidence" standard that had been adopted by the panel majority.[2] Indeed, even the concurring

---

[2] On December 6, 1993, in a Motion for Extension of Time to Respond to Petition for Rehearing *En Banc*, Government counsel from the Appellate Staff of the Civil Division of the Department of Justice gave the following advice to the court:

> In *Seigert v. Gilley*, 111 S. Ct. 1789 (1992), the Supreme Court was faced with the question of what heightened standard applies in unconstitutional motive cases. The Court did not resolve that question, and instead decided the case on other grounds. *See Siegert*, 111 S. Ct. at 1791. *See also Kimberlin*, Dissenting Op. at 19 & n.9. However, in the government's brief to the Supreme Court, the Solicitor General did not argue in support of a "direct evidence" standard. The Solicitor General noted that the Supreme Court in *Holland v. United States*, 348 U.S. 121, 140 (1954), held that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *See* Respondent's Br. 20-21 n.13.
>
> Given the government's position in the Supreme Court in *Siegert*, before any response is filed by the government in this Court regarding appellee's petition for rehearing *en banc*, we

member of the majority acknowledged that the panel's judgment rested on a rule that is "completely arbitrary and unrelated to the strength of the plaintiff's case." *Kimberlin v. Quinlan*, 6 F.3d 789, 798 (D.C. Cir. 1993) (Williams, J., concurring). Yet, by a margin of 5 (in favor of *en banc* review) to 4 (against), with one judge recused, a plurality of the court has blocked *en banc* consideration of this case. This result is unfathomable.

In particular, I find it incomprehensible that this court has refused to rehear a case which is so clearly of great importance, and which rests upon a rule that is concededly "completely arbitrary and unrelated to the strength of the plaintiff's case." The result of our action is all the more unintelligible in light of the fact that a recent decision of the Supreme Court calls into question whether federal courts may ever apply "heightened pleading" requirements not provided for in the Federal Rules of Civil Procedure. Even assuming the validity of heightened pleading requirements generally, *Kimberlin* creates a regime under which a civil rights plaintiff must prove more to survive a motion to dismiss than he or she must prove in order to win at trial. This rule is nothing short of Kafkaesque, and ours is the only circuit that has failed to recognize this fact.

First, the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), issued just six months before *Kimberlin*, strongly suggests that federal courts may not impose so-

---

must consult with the Solictor General's Office regarding the position to be taken on the "direct evidence" rule as an original matter before the *en banc* Court. If a decision is made not to defend that standard, then the individual defendants here must be given an opportunity to decide whether they wish to seek private counsel.

Subsequently, on January 11, 1994, Government counsel withdrew their appearance and advised this court that Mr. Quinlan would be represented by private counsel in the matter pending before the *en banc* court.

called "heightened pleading" requirements in civil rights cases. However, under the rule announced by the majority in *Kimberlin*, a plaintiff making a civil rights claim that requires proof that a Government official acted with an unconstitutional motive must plead "direct evidence" of the official's intent. Plaintiffs alleging unconstitutional motive are not permitted any discovery, and are subject to dismissal unless they meet this standard. *See Kimberlin*, 6 F.3d at 804-05 n.5 (Edwards, J., dissenting). The majority's opinion in *Kimberlin* cannot be squared with *Leatherman*.

The Court in *Leatherman* held that a "'heightened pleading standard' -- more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure -- could not be applied in civil rights cases alleging municipal liability under [42 U.S.C. § 1983 (1988)]." 113 S. Ct. at 1161. Although *Leatherman* did not consider the permissibility of heightened pleading requirements in cases involving individual Government officials, because that question was not before the Court, the logic of the decision indicates that *all* such requirements are improper, except as expressly required by the Federal Rules. This conclusion can be gleaned from the Court's unequivocal statement that "it is *impossible* to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163 (emphasis added). Further, *Leatherman* observed that Rule 9(b) imposes a particularity requirement only in cases alleging fraud or mistake, concluding that under the familiar doctrine of *expressio unius est exclusio alterius*, federal courts were not free to establish "a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims." *Id.*

Although recognizing that the pleading standard invalidated in *Leatherman* was prompted by legitimate policy concerns, the Supreme Court underscored its holding by stating that heightened pleading requirements could only be imposed by "amending the Federal Rules, and not by

judicial interpretation." Id.[3] Thus, it seems clear that this court has no authority to depart from the Federal Rules on the ground that some judges believe that the purposes of qualified immunity might be better served by imposing more stringent pleading requirements. *Leatherman's* emphatic language seems to admit of only one reading: heightened pleading standards other than those set forth in Rule 9(b) are simply *impossible to square* with the Federal Rules of Civil Procedure, and are therefore invalid.

Second, even assuming that some form of heightened pleading requirement may be imposed in this case, the rule announced in *Kimberlin* strayed from binding circuit precedent by holding that our heightened pleading standard requires a plaintiff to plead direct, as opposed to circumstantial, evidence of intent. In *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the case which is the foundation for later decisions purporting to announce a direct evidence requirement, this court held that when the unconstitutional motive of Government officials is an essential element of a claim, a plaintiff's pleading must rest on "non-conclusory allegations of evidence of such intent" in order to proceed to discovery on the claim. *Hobson* did not distinguish between direct and circumstantial evidence -- indeed, the intent of three of the five defendants in that case was established *solely* by circumstantial evidence. *See Kimberlin*, 6 F.3d at 805-06 (Edwards, J., dissenting). The direct evidence requirement grows out of this court's later decisions interpreting *Hobson*, particularly *Siegert v. Gilley*, 895 F.2d 797, 804 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991). *See Kimberlin*, 6 F.3d at 805-808 (Edwards, J., dissenting)

---

[3] The Ninth Circuit recognized in a recent decision that *Leatherman* potentially invalidates heightened pleading standards in civil rights cases brought against invididual officials, but declined so to hold because the Supreme Court had withheld judgment on that issue, and the panel felt that it was bound by Ninth Circuit precedent adopting a heightened pleading requirement. *See Branch v. Tunnell*, No. 93-35144, 1994 WL 5496, at *1 (9th Cir. Jan. 12, 1994), *petition for cert. filed*, Feb. 17, 1994.

(discussing genesis of direct evidence rule in misreadings of *Hobson*). At best, then, the law of the circuit is in disarray, and *en banc* review is needed to repair this situation.

In addition, it is noteworthy that, when the Supreme Court upheld *Siegert* on grounds not relied upon by the panel in that case, four Justices made plain that they believed that the direct evidence rule was error. In a separate concurrence, Justice Kennedy wrote that he would "reject . . . the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring). Instead, Justice Kennedy concluded that a plaintiff should be required to "put forward specific, nonconclusory factual allegations which establish malice, or face dismissal." *Id.* In another separate opinion authored by Justice Marshall (joined by Justices Blackmun and Stevens), the dissenters in *Siegert* stated that this court "erred in holding" that a plaintiff must proffer "*direct* evidence of the unconstitutional motive." *Id.* at 1800 (Marshall, J., dissenting).

Finally, neither logic nor law offers any support for the direct evidence requirement. The probative value of circumstantial evidence is "intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and such evidence can in some cases be "more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). In both civil and criminal contexts, motive is usually established by circumstantial evidence because it is virtually impossible to obtain any other evidence of a defendant's state of mind. *See generally Kimberlin*, 6 F.3d at 809 (Edwards, J., dissenting) (collecting and discussing cases). Moreover, neither this nor any other circuit requires civil rights plaintiffs to prove intent *at trial* via direct evidence -- circumstantial evidence is perfectly adequate proof. Indeed, circumstantial evidence of intent is sufficient proof even in *criminal* prosecutions. Thus, *Kimberlin* countenances

dismissal of claims that would easily be meritorious at trial, simply because a plaintiff cannot, before even beginning discovery, produce direct evidence as to a defendant's motive.

Quite simply, as noted by the Seventh Circuit in a decision rejecting the direct evidence requirement, and by Judge Williams in his concurrence to the panel's opinion in *Kimberlin*, the direct evidence requirement will prove fatal to all attempts to prove motive, except in the rare case in which a defendant confesses. *See id.* at 798 (Williams, J., concurring); *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, *and cert. denied*, 112 S. Ct. 1242 (1992). As Judge Williams correctly observed, the rule adopted by the *Kimberlin* panel requires dismissal of a claim brought by a plaintiff who adduces overwhelming circumstantial evidence of guilt, but would permit another plaintiff to proceed based upon a single perjured contention that he overhead a defendant's confession. *Kimberlin*, 6 F.3d at 798 (Williams, J., concurring). Such a result is, as the *Kimberlin* concurrence forthrightly admits, "completely arbitrary and unrelated to the strength of the plaintiff's case." *Id.* It is no wonder that all of the other circuits that have considered a direct evidence requirement have explicitly rejected it. *See id.; Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) (rejecting direct evidence requirement "[b]ecause evidence of intent is largely within the control of the defendant and often can be obtained only through discovery"); *Elliott*, 937 F.2d at 345 (noting that "there is no principled difference between direct and circumstantial evidence"); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989) (rejecting direct evidence requirement because it would require plaintiff "to come forth with more evidence than he would have to produce to prevail on the merits").

By refusing to rehear this case *en banc*, a plurality of this court has imposed a rule which is irrational and arbitrary, and which finds no support in the Federal Rules of Civil Procedure. There has been no suggestion from the

judges voting to deny rehearing that Supreme Court precedent *compels* this circuit to adopt a direct evidence rule. The plurality instead makes a self-styled "trade-off" between competing ends. Concurrent to Denial of Suggestion for Rehearing *En Banc* (Williams, J.). This "trade-off," however, effectively closes the courthouse doors to any plaintiff to whom it applies, denying relief to a whole class of claims, apparently only on the basis of the plurality's conviction that the Supreme Court has gone too far in permitting them.

The court's action in denying *en banc* review rests on an extraordinary use of judicial authority, one that I thought was not tolerated by those who purport to believe in "judicial restraint." *See, e.g.,* Laurence H. Silberman, Chevron -- *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 821 (1990) (noting that the author counts himself among those who have "decried the extraordinary expansion of judicial power in the latter half of this century;" and observing that the one concept that most distinguishes those who advocate "judicial restraint" is "avoidancer of judicial policy making"). The plurality's decision has its roots in policy choices, not in law. This is not surprising, however. For, as one of my colleagues has observed, "When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, . . . they tend to exceed the appropriate bounds of judicial restraint." *United States v. Pryce*, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, J., dissenting in part).

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny are the law of the land and control the actions of this court. I am amazed that a plurality of the members of this circuit have chosen to adopt an admittedly arbitrary and illogical rule that effectively renders impossible all *Bivens*-type civil rights actions that turn on the intent of a Government official. This court is bound by Supreme Court precedent, by fidelity to our own precedents, and by simple logic, both to rehear and

revise *Kimberlin v. Quinlan*. It is my hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit.

I dissent.

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 9. Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a

summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

FILED
JUL 22 1994

No. 93-2068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and LOYE W. MILLER, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly applied a heightened pleading standard to petitioner's *Bivens* claims that required petitioner to produce direct evidence of an unconstitutional motive in order to avert summary judgment and dismissal.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Creighton, 483 U.S. 635 (1987) 8
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*
Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) 12
Bombliss v. Lee, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994) 12
Branch v. Tunnell, 14 F.3d 449 (9th Cir.), *cert. denied*, 62 U.S.L.W. 3842 (June 20, 1994) 10, 13
Butz v. Economou, 438 U.S. 478 (1978) 9
Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986) 10
Davis v. Passman, 442 U.S. 228 (1979) 12
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8, 9, 10, 14
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir.), *cert. denied*, 470 U.S. 1084 (1985) 10
Holland v. United States, 348 U.S. 121 (1954) 10
Hunter v. Bryant, 112 S. Ct. 534 (1991) 8, 9
Jordan By Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 13
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) 12, 13
Martin v. D.C. Metropolitan Police Dep't., 812 F.2d 1425 (D.C. Cir. 1987) 7, 8, 11
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 11
Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 9, 10
Oropallo v. Parrish, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) 12
Siegert v. Gilley, 895 F.2d 797 (D.C. Cir.), *aff'd on other grounds*, 500 U.S. 226 (1991) 8, 9
Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir.), *cert. denied*, 497 U.S. 1038 (1990) 8
Wyatt v. Cole, 112 S. Ct. 1827 (1992) 9

STATUTES AND FEDERAL RULES

18 U.S.C. § 2511 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2671, *et seq.* 5

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1983	12
28 C.F.R. §§ 540.61-540.63	3
28 C.F.R. § 540.64	3
28 C.F.R. § 541.22	3
28 C.F.R. § 541.22(a)	4
Fed. R. Evid. 407	11
Fed. R. Evid. 408	11
Fed. R. Evid. 409	11
First Circuit Local Rule 36.2(b)6	12
Seventh Circuit Rule 53(b)2	12
MISCELLANEOUS	
60A Am. Jur. 2d §§ 96-97	11
McCormick on Evidence, (4th ed. 1992)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and LOYE W. MILLER, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The order and opinion denying petitioner's suggestion for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993, and a petition for rehearing was denied on April 1, 1994 (Pet. App. 79a). The petition for a

writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. This is a *Bivens*[1] action, in which petitioner, a former federal prisoner,[2] seeks damages from respondents, J. Michael Quinlan, the former Director of the Federal Bureau of Prisons ("BOP"), and Loye W. Miller, Jr., the former Director of Public Affairs for the U.S. Department of Justice. Petitioner alleges, *inter alia,* that Quinlan and Miller conspired to violate his First Amendment rights when they allegedly caused him to be placed in administrative detention because of the content of his speech.

The facts are largely undisputed. Pet. App. 3a, 7a. Approximately two weeks prior to the 1988 presidential election, petitioner told Nina Totenberg, a correspondent for National Public Radio, that he had sold marijuana to then vice-presidential candidate Dan Quayle in the early 1970s while Quayle was in law school. Totenberg did not report the story because she could not corroborate it. C.A. App. 79. Petitioner then offered the story to NBC News, which requested permission from BOP, one week prior to the November 1988 election, to interview and videotape petitioner. Although the NBC request was too late under BOP procedures, Quinlan intervened and directed the prison to accommodate NBC and expedite the interview. Pet. App. 3a. Thus, on November 4, 1988, four days prior to the election, NBC videotaped a four-hour interview with petitioner that it never aired. *Id.*

---

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] At all relevant times, petitioner was incarcerated in the federal prison at El Reno, Oklahoma where he was serving a fifty-one year sentence for drug- and explosives-related charges. Pet. App. 3a. He was released from prison in February 1994.

The NBC taping was itself reported in a local newspaper and resulted in other news organizations seeking access to petitioner. To accommodate those requests, the acting warden scheduled a press conference for petitioner at 7:00 p.m. the same evening. Pet. App. 4a. That afternoon BOP's Central Office in Washington, D.C. learned from a wire service inquiry that petitioner was scheduled to hold a "press conference" at the El Reno prison.[3] Quinlan ordered the press conference canceled because although BOP regulations permit media contacts by inmates and small press pools in some circumstances, neither the regulations nor BOP policy permit inmate press conferences. Pet. App. 4a.[4]

At approximately 11:30 p.m. on the evening of November 4, 1988, petitioner was placed in administrative detention—a "non-punitive single cell status"—for approximately one day. Pet. App. 5a.; 28 C.F.R. § 541.22. Petitioner had telephoned Totenberg that evening, "complained bitterly" about the cancellation of his press conference and expressed concern "about what the Justice Department might do to him." C.A. App. 80, 83. Totenberg then called Miller who recalls that she said petitioner believed that his own "safety was threatened by the hostile attitude of the prison authorities." *Id.* at 84. Subsequently, Miller telephoned his counterpart at BOP and informed him of the Totenberg call, including that petitioner believed "he was in danger." Pet. App. 5a; 53a.

BOP officials then informed Quinlan that petitioner had told Totenberg "he might be in some 'danger.'" C.A.

---

[3] Evidence in the record below reflects that Totenberg also telephoned Miller that afternoon and complained about petitioner holding a press conference. She indicated that she had given up her chance exclusively to report his story and that with a press conference another news organization was not likely to be so responsible. C.A. App. 82.

[4] *See* 28 C.F.R. §§ 540.61-540.63 (permitting limited media interviews of inmates); 28 C.F.R. § 540.64 (permitting small press "pools" with one press member from each major press medium).

App. 95. Based upon that information, Quinlan instructed El Reno prison officials to take the proper measures to ensure petitioner's safety, which he "clearly understood" to mean that El Reno officials would place petitioner in a non-punitive single cell status pending assessment of the threat. Pet. App. 5a.[5]

Upon hearing from other inmates that petitioner had been placed in detention based on a fear that he was in danger, Totenberg telephoned Miller. C.A. App. 80. When she learned during that conversation that she was being quoted as the source for saying petitioner was in danger, Totenberg told Miller it was "untrue" and denied having said "any such thing." Pet. App. 53a. At approximately 7:30 p.m. the next day, November 5, 1988, and three days prior to the election, petitioner was released from administrative detention and returned to the general prison population. He was released from detention after an investigation revealed no threat to petitioner's safety and after stating that he perceived no threat. Pet. App. 6a.

Petitioner was also placed in administrative detention on November 7, 1988 and December 22, 1988 for violating prison telephone regulations. Following administrative disciplinary hearings, petitioner was found guilty of the November 7 infraction and not guilty of the December 22 infraction. Quinlan and Miller had no involvement in those detentions. Pet. App. 6a-7a, 15a-17a.

2. On July 2, 1990, petitioner filed this action in federal district court against Quinlan in both his individual and official capacities, Miller in his individual capacity and the United States. The complaint asserted *Bivens*-

---

[5] See 28 C.F.R. § 541.22(a). The contemporaneous detention order indicates that petitioner was placed in detention based on information from Totenberg and the fact that the evening watch lieutenant had received information that other prisoners were saying that if petitioner had "snitched" on Quayle he might do the same to them. Pet. App. 5a.

type claims against Quinlan and Miller for alleged violations of the First and Fifth Amendments and various claims against the United States.[6]

Following some discovery, the respondents and the United States moved to dismiss or for summary judgment asserting, *inter alia*, that Quinlan and Miller are entitled to qualified immunity from suit in their individual capacities. The district court granted the motion in part and dismissed petitioner's Fifth Amendment and assault and battery FTCA claims. The court denied the motion as to all remaining claims. Pet. App. 44a-63a. In denying respondents immunity, the district court recognized that circuit precedent requires plaintiffs alleging unconstitutional motive to meet a heightened pleading standard. The court concluded that petitioner's allegations are "tangible and nonconclusory." Pet. App. 52a. Quinlan and Miller immediately appealed the denial of immunity.

3. a. A divided panel of the court of appeals reversed. The majority, in an opinion by Judge Henderson, held that circuit precedent required that when a plaintiff alleges a constitutional tort by a government official, and the outcome hinges on the official's intent or state of mind, the plaintiff must plead and produce direct evidence of an improper motive in order to withstand a motion to dismiss or for summary judgment. Pet. App. 8a-12a. As to the merits the majority concluded:

> Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened pleading

---

[6] The claims against the United States were for assault, battery and false imprisonment under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*, and for violation of Title III of the Organized Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511, arising out of the monitoring of Kimberlin's telephone calls. Pet. App. 44a-64a.

> standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened pleading standard are intended to cut short.

Pet. App. 17a.

Judge Williams concurred in the opinion but questioned the validity of the direct evidence test. Pet. App. 17a-19a. Judge Edwards dissented, stating that he saw no basis for a direct evidence standard and that he doubted the validity of any heightened pleading standard. Pet. App. 20a-21a.

b. The court of appeals denied rehearing and a suggestion for rehearing *en banc*.[7] Judge Williams, in a statement concurred in by Judges Silberman and Buckley, wrote that the "direct evidence" rule, although imperfect, preserved accountability for constitutional violations based on motive while safeguarding federal officials from the burdens and expense of unwarranted litigation.

> Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money.

Pet. App. 66a. Judge Williams concluded that it was "on balance preferable" to keep the direct evidence rule. *Id.* at 66a-67a. Judge Silberman also separately concurred. *Id.* at 67a.

---

[7] Petitioner argues that a majority of active circuit judges "favored rehearing than opposed it." Pet. 10. The record, however, reflects that only four judges voted in favor of rehearing *en banc*, Pet. App. 65a. Nevertheless, on June 23, 1994, the court of appeals denied respondents' request for a correction of Judge Edwards's statement in dissent that five judges voted in favor of *en banc* review and four against. Pet. App. 69a.

Judge Edwards, joined by Chief Judge Mikva and Judge Wald, reiterated in dissent the points made in his panel dissent. He questioned the viability of any heightened pleading standard and asserted that if a heightened pleading standard did apply, he saw no basis for a direct evidence requirement. *Id.* at 72a.

ARGUMENT

There is no merit to petitioner's contention that there is a conflict among the courts of appeals on the application of a heightened pleading standard in *Bivens* cases where motive is a component of plaintiff's claim; virtually every appellate court that has considered the issue has adopted some form of heightened pleading. Similarly, there is no merit to petitioner's contentions that the District of Columbia Circuit's standard conflicts with this Court's precedents or that heightened pleading standards do not apply to *Bivens* cases. The petition for certiorari should, therefore, be denied.

1. The District of Columbia Circuit, like nearly every other court of appeals, requires plaintiffs to meet a heightened pleading standard when they sue government officials in their individual capacities and improper motive is an element of the claim. Pet. App. 10a n.10 (citing cases). The District of Columbia Circuit has fashioned a direct evidence standard applicable to those cases:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. *That is, some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial.*

Martin v. D.C. Metropolitan Police Dep't., 812 F.2d 1425, 1435 (D.C. Cir. 1987) (emphasis supplied);

Whitacre v. Davey, 890 F.2d 1168, 1171 (D.C. Cir.), *cert. denied*, 497 U.S. 1038 (1990); *Siegert v. Gilley*, 895 F.2d 797, 801-02 (D.C. Cir.), *aff'd on other grounds*, 500 U.S. 226 (1991).

The heightened pleading standard was formulated following this Court's adoption in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) of an objective test for qualified immunity, whereby government officials are entitled to immunity from suit unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. In seeking to apply *Harlow*, the District of Columbia Circuit recognized that the objective test is problematic in cases where improper motive is alleged since motive encompasses a subjective component.

> The 'clearly established law' and 'objective reasonableness' facets of current qualified immunity doctrine tug in opposite directions where, as here, the 'clearly established law' itself contains a subjective component.

Martin, 812 F.2d at 1432.

On the one hand, this Court has repeatedly emphasized the heavy costs imposed by "insubstantial claims" and the need to protect federal officials from such claims with a vigorous application of qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991); *Siegert*, 500 U.S. at 231-32; *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). On the other hand, because motive encompasses a subjective component, a *Bivens* plaintiff alleging unlawful motive could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801.

Harlow's qualified immunity standard *presumes* the government official acted in good faith, as long as his objective conduct violates no clearly established right, and that presumption *is not* rebuttable by any evidence that the official actually intended to violate the law or in fact acted with an unlawful or malicious intent. Thus, *Harlow's* irrebuttable presumption of good faith could be read to bar any *Bivens* action that is predicated upon an unconstitutional motive. The court of appeals thought this result too harsh and sought by way of developing a heightened pleading standard to implement the command of *Harlow* to protect government officials from "insubstantial suits" while still providing a "realistic avenue for vindication of constitutional guarantees." 812 F.2d at 1433, quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978) and *Harlow*, 457 U.S. at 814. The result was the direct evidence heightened pleading standard.

The concerns that led the District of Columbia Circuit to formulate that test are no less compelling today. Indeed, this Court has repeatedly emphasized the key principles of immunity law that undergird the direct evidence test: (i) qualified immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526 (emphasis in original); and (ii) immunity "ordinarily should be decided by the court long before trial" and "at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536-37. Because substantial social costs, such as the burdens of discovery, the expenses of litigation, the diversion of government officials from their duties and the chill of prospective litigation, ensue when government officials are the targets of insubstantial suits, *id.*, qualified immunity was designed "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed on those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232; *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992).

The District of Columbia Circuit's direct evidence standard is a thoughtful and appropriate response to the

concern that the application of a lesser pleading standard would effectively reimpose "precisely the burden *Harlow* sought to prevent." *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir.), *cert. denied*, 470 U.S. 1084 (1985). The direct evidence standard also furthers the important public policy of protecting a government official's ability to exercise discretion without the constant threat of personal liability based upon how the circumstances might be perceived by another. The import of this protection is great because the more delicate, important or controversial the policy decision, the greater the threat of suit based upon mistaken inferences. In short, the direct evidence standard allows government officials to act based on proper considerations, not based on whether their actions may be misconstrued by others and the threat of personal liability.

Although no other circuit has adopted the "direct evidence" formulation employed by the District of Columbia Circuit, the difference between the tests of the various circuits is merely one of degree that falls short of a conflict warranting review by this Court. See e.g. *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 62 U.S.L.W. 3842 (June 20, 1994) (requires "nonconclusory allegations setting forth evidence of unlawful intent" with "specific and concrete" facts); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) (conclusory allegations of unconstitutional conduct insufficient; "some factual basis" is required). Indeed, every formulation and variation of the heightened pleading standard is aimed at the same end—"to further the goal of qualified immunity, namely to protect government officials from the burdens of litigating 'insubstantial claims.'" Pet. App. 10a, quoting *Mitchell*, 472 U.S. at 526 and *Harlow*, 457 U.S. at 817-18.

2. There is no merit to petitioner's contention that the direct evidence test conflicts with this Court's precedents. To be sure, this Court has recognized in other settings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evdence." *Holland v. United*

States, 348 U.S. 121, 140 (1954). The Court, however, was not addressing the issue presented here—requiring a litigant to adduce a certain type of evidence because of extrinsic policy considerations (here, immunity), *not* because it is adjudged intrinsically superior in terms of its probative value.

The direct evidence rule is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence. Rather, the policy reasons for qualified immunity—which this Court has repeatedly emphasized—explain the imposition of a direct evidence restriction in the *Bivens* context. As Justice (then Judge) Ginsburg noted in authoring *Martin*, it is not "extraordinary" to limit the inferences that can be drawn from evidence based upon substantive policy concerns. 812 F.2d at 1435-36. Antitrust, conspiracy and fraud cases all require something beyond bare allegations to survive summary judgment. *Id.*, citing, *inter alia*, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Other examples of such evidentiary limitations abound. Traditionally under the common law and federal law, the need to protect witnesses from being deterred from providing honest testimony has justified very strict evidentiary standards for proving perjury, generally requiring "direct" evidence and two witnesses. See 60A Am. Jur. 2d §§ 96-97. Quite frequently entire types of evidence are excluded from consideration based upon policy grounds wholly apart from the credibility, strength or probative value of the evidence. See e.g. Fed. R. Evid. 407 (remedial measures), 408 (offers of compromise), 409 (payment of medical expenses); 1 *McCormick on Evidence*, (4th ed. 1992), 313-67 (attorney-client privilege), 292-312 (marital communications privilege), 368-92 (physician-patient privilege).

The District of Columbia Circuit's formulation of the heightened pleading standard in no way conflicts with

this Court's teachings. Rather, it represents a logical and practical effort to apply *Harlow's* objective standard in cases where improper motive is at issue.[8]

3. Relying on this Court's recent decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), petitioner argues that there is now a split in the circuits regarding whether *any* heightened pleading standard can be applied. In *Leatherman*, this Court held that heightened pleading of claims against municipalities under 42 U.S.C. § 1983 is not required. The Court, however, expressly declined to rule on the issue of heightened pleading in qualified immunity cases. 113 S. Ct. at 1162. Emphasizing that the case before it involved a municipal defendant not entitled to immunity, the Court stated that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

There is no reason for this Court to review the decision below in light of *Leatherman*. No real circuit conflict has developed, despite petitioner's argument to the contrary. Two of the cases petitioner cites as authority for a conflict, *Oropallo v. Parrish*, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) and *Bombliss v. Lee*, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994), are unpublished and applicable circuit court rules proscribe the citation of those cases as precedent.[9] The only case that arguably creates a conflict, *Black v. Lane*, 22 F.3d 1395 (7th Cir. 1994), states in passing that "a heightened pleading standard does not apply to § 1983

---

[8] The direct evidence test is not, as petitioner would have it, an impossible standard to meet. See e.g., *Davis v. Passman*, 442 U.S. 228, 230 n.3 (1979) (direct evidence in the form of a letter from defendant).

[9] First Circuit Local Rule 36.2(b)6 states that unpublished decisions may be cited only in related cases. Seventh Circuit Rule 53(b)(2) similarly provides that unpublished decisions shall not be cited or used as precedent except in the same or related cases.

claims." *Id.* at 1399. In context, that statement appears to be mere dictum and, in any event, the Seventh Circuit engaged in no analysis in citing *Leatherman* for that proposition.

By contrast, the Ninth Circuit—the only court of appeals, other than the court below, to address the issue in a published decision after *Leatherman*—likewise concluded that it should adhere to the heightened pleading standard established prior to *Leatherman*. See *Branch v. Tunnell*, 14 F.3d at 455-57; Pet. App. 9a n.9. Thus, it cannot seriously be maintained that there is a circuit conflict of any merit.[10]

4. A writ of certiorari is particularly unwarranted here because even without the application of the direct evidence test petitioner's case is, as the court below correctly held, based "only on inference and weak circumstantial evidence, notably the timing of events." Pet. App. 17a. Much of petitioner's case relies on inadmissible newspaper articles and unwarranted inferences. Indeed, the court of appeals concluded,

> the motive Kimberlin alleges—denying him access to the press—seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others, even during his detention.

Pet. App. 14a. As such, this case presents precisely the kind of insubstantial claims this Court's qualified immunity precedent was designed "to cut short," *id.* at 17a, regardless of what pleading standard might be applied.[11]

---

[10] The Fourth Circuit, in *Jordan By Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994), has also analyzed *Leatherman*, and "express[ed] no view" as to whether heightened pleading standards apply to claims against individual government officials.

[11] Petitioner incorrectly asserts in footnote 11 of his petition that respondents have conceded that summary judgment was properly denied by the district court if petitioner's standard of proof

Finally, this is not a case, as was *Bivens*, where "it is damages or nothing." *Bivens*, 403 U.S. at 410; *Harlow*, 457 U.S. at 814. No matter how the petition for certiorari is resolved, petitioner still has unresolved claims against the United States pending in district court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents

* Counsel of Record

JULY 1994

---

is applied. That statement is taken out of context and refers to petitioner's formulation of a preponderance of the evidence test he urged on the court of appeals—a standard more lenient than is applied to ordinary civil cases.

Supreme Court, U.S.
FILED
AUG 18 1994
OFFICE OF THE CLERK

(3)

No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT*
ALAN N. HARRIS
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

*Counsel of Record

Attorneys for Petitioner

8 pp

TABLE OF AUTHORITIES

CASES

Baxter v. Vigo City School Corporation, 26 F.3d 728 (7th Cir. 1994) 4

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) 5

Bombliss v. Lee, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994) 5

Butz v. Economou, 438 U.S. 478 (1978) 4

Dell v. Board of Education, No. 93-1206, 1994 U.S. App. LEXIS 21146 (7th Cir. August 9, 1994) 4, 5

Fobbs v. Holy Cross Health System Corporation, No. 92-15852, 1994 U.S. App. LEXIS 17490 (9th Cir. July 19, 1994) 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3, 4

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993) 4

Oropallo v. Parrish, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) 5

Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994) 3

RULES OF PROCEDURE

1st Cir. R. 36.2(a) 5

7th Cir. R. 53(a) & (c) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and

LOYE W. MILLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The petition for a writ of certiorari explained that the courts of appeals are in disarray regarding the requirement of a heightened pleading standard and a direct evidence standard in cases involving qualified immunity. Recent decisions of the courts of appeals, issued after the petition was filed, have exacerbated the conflicts among the circuits. These conflicts leave federal jurisprudence uncertain and allow the choice of forum to be dispositive in the many *Bivens* actions where motive is at issue.

As the petition also explained, five Justices of this Court have expressly criticized the direct evidence standard in this context and six members of the District of Columbia Circuit wrote in this case that Supreme Court review is essential. Immediate resolution of

these conflicts among the circuits is vital to restore uniformity and to establish a proper balance between an individual's right to seek vindication for constitutional wrongs and the ability of government officials to be free from insubstantial claims.

Respondents' brief in opposition only confirms that this case warrants certiorari. Respondents concede that the District of Columbia Circuit stands alone in requiring direct evidence in cases involving qualified immunity, and the decision below, therefore, conflicts with every other court of appeals that has addressed this requirement. Moreover, despite respondents' protestations, the decision below squarely conflicts with decisions of other courts of appeals, which have concluded that this Court's opinion in *Leatherman* precludes judge-made heightened pleading standards in cases involving qualified immunity.

1. Respondents concede, as they must, that "no other circuit has adopted the 'direct evidence' formulation employed by the District of Columbia Circuit." Br. in Opp. 10. Nonetheless, respondents seek to diminish this admitted circuit conflict by characterizing the evidentiary difference as "merely one of degree." *Id.* But it was precisely this difference of "degree" that was dispositive in this case, resulting in dismissal of petitioner's *Bivens* claim. It is undisputed that if the standard articulated by other courts of appeals had been applied here, petitioner's claim would not have been dismissed. Even respondents' counsel below acknowledged that this case turns on the pleading standard: "If plaintiff's standard of pleading and proof is applied to this case, we agree that summary judgment was properly denied." Appellants' Reply Brief (D.C. Cir., No. 91-

5315) at 2. Events subsequent to the filing of the petition confirm the existence of a growing conflict among the circuits. The Fifth Circuit has now joined the Sixth, Seventh and Ninth circuits in rejecting the direct evidence requirement employed by the District of Columbia Circuit in this case. *Tompkins v. Vickers*, 26 F.3d 603, ___ (5th Cir. 1994)("[R]equiring direct evidence . . . effectively insulate[s] from suit public officials who deny an improper motive"). *See* Pet. 12-13.[1]

2. Unable to deny this circuit conflict, respondents instead contend that the District of Columbia Circuit's heightened pleading requirement is justified by unexplained "policy reasons." Yet, respondents agree there is no probative difference between direct and circumstantial evidence. Br. in Opp. at 11 (the direct evidence requirement is "*not* because [direct evidence] is adjudged intrinsically superior in terms of its probative value")(emphasis in original); *see* Pet. App. 18a (Williams, J., concurring)("The distinction between direct and circumstantial evidence . . . appears completely arbitrary and unrelated to the strength of the plaintiff's

---

[1] Implicitly acknowledging the strength of petitioner's evidence of wrongdoing, respondents resort to arguing that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), created a "presumption" of good faith that is "*not* rebuttable" and "could be read to bar any *Bivens* action that is predicated upon an unconstitutional motive." Br. in Opp. 9 (emphasis in original). Nothing in *Harlow* remotely suggested any "bar" of *Bivens* claims, and "[e]very Circuit that has considered the question has concluded that a public official's motive or intent *must* be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *Tompkins*, 26 F.3d at ___ (emphasis added).

case"); Pet. 13-14. In any event, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* explicitly rejected judicial "policy" as a license for imposing heightened pleading standards contrary to the Federal Rules of Civil Procedure. 113 S. Ct. 1160, 1163 (1993)(stating that such results "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"); *see Harlow*, 457 U.S. at 808 (holding that frivolous claims should be eliminated by "firm application of the Federal Rules of Civil Procedure," quoting *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)).

In this case, petitioner presented tangible, nonconclusory, and concrete evidence of a constitutional wrong that was sufficient to allow the case to proceed absent the District of Columbia Circuit's direct evidence standard. As the district court explained: "[I]n this case the distinction . . . is crucial, . . . while the record before the Court on the key issue of defendants' motive is circumstantial, it is also tangible and far from being merely conclusory." Pet. App. 50a-51a.

3. The Court's reservation in *Leatherman* of the question whether heightened pleading standards are permissible in cases involving individuals asserting qualified immunity further crystallizes the need for review. In two opinions subsequent to the petition, the Seventh Circuit, relying on *Leatherman*, rejected a heightened pleading standard in individual liability cases. *See Baxter v. Vigo City School Corp.*, 26 F3d 728, ___ (7th Cir. 1994), at *14 ("[T]he Supreme Court recently has made very clear [that] there is no heightened pleading requirement for civil rights actions"); *Dell v. Board of Educ.*, No. 93-1206, 1994 U.S.

App. LEXIS 21146, at *38 (7th Cir. August 9, 1994) ("[W]e must refrain from imposing a heightened pleading requirement on this civil rights action"). *See also Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994)(stating that "heightened pleading standards[s] do[] not apply to § 1983 claims");[2] *see also Fobbs v. Holy Cross Health Sys. Corp.*, No. 92-15852, 1994 U.S. App. LEXIS 17490, at *25 (9th Cir. July 19, 1994)("[T]he Supreme Court has . . . rejected heightened pleading standards under the Federal Rules of Civil Procedure for almost all claims except fraud and mistake").[3]

---

[2] There is no basis for respondents' attempt to belittle the conflict *Black* creates by stating that "the Seventh Circuit engaged in no analysis in citing *Leatherman*." Br. in Opp. 13. It would be more accurate to say the Seventh Circuit regarded the guidance of *Leatherman* to be so clear that no further discussion was warranted. In any event, the Seventh Circuit's subsequent reliance on *Leatherman* in *Baxter* and *Dell* confirms the ongoing conflict with the District of Columbia Circuit.

[3] Respondents assert that the First Circuit's decision in *Oropallo v. Parrish*, No. 93-1953, 1994 WL 168519 (1st Cir. May 5, 1994) and the Seventh Circuit's ruling in *Bombliss v. Lee*, No. 93-1220, 1994 WL 117970 (7th Cir. April 6, 1994), rejecting heightened pleading standards in qualified immunity cases, do not contribute to the circuit split because they are unpublished. To the contrary, the Seventh Circuit's decisions in *Black*, *Dell* and *Baxter*, three published cases, make reliance on *Bombliss* merely illustrative. Moreover, neither *Oropallo* nor *Bombliss* announced a new legal rule; thus, under applicable circuit rules, publication was not warranted. 7th Cir. R. 53(a); *id.* at 53(c) ("[w]hen the decision does not satisfy the criteria for publication . . . it *will be* filed as an unpublished order")(emphasis added); *see* 1st Cir. R. 36.2(a) (stating that publication may be forgone when the opinion, *inter alia*, does not "articulate a new rule of law").

For these reasons, and those set forth in the petition, the same claim that would be dismissed in some courts of appeals would proceed to trial in others. This conflict on the qualified immunity of public officials is important, recurring and plainly warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT*
ALAN N. HARRIS
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

*Counsel of Record
Attorneys for Petitioner

August 18, 1994

Supreme Court, U.S.
FILED
JAN 4 1995
OFFICE OF THE CLERK

No. 93-2068

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T. L. PILLARD
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

23

QUESTION PRESENTED

1. Whether, in a *Bivens* case in which unlawful motive is an element of a constitutional claim, a plaintiff must meet a "heightened pleading" standard to survive a motion to dismiss or for summary judgment raising a qualified-immunity defense.

2. Whether a plaintiff in a *Bivens* case in which unlawful motive is an element of a constitutional claim must produce, prior to discovery, "direct" as opposed to circumstantial evidence of unlawful motive in order to avoid dismissal or summary judgment.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	11
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Babb v. *Dorman*, 33 F.3d 472 (5th Cir. 1994)	17
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	1
Black v. *Lane*, 22 F.3d 1395 (7th Cir. 1994)	18
Brunch v. *Tunnell*:	
937 F.2d 1382 (9th Cir. 1991)	10, 12, 13
14 F.3d 449 (9th Cir.), cert. denied, 114 S. Ct. 2704 (1994)	16, 17
Crutcher v. *Kentucky*, 883 F.2d 502 (6th Cir. 1989)	12-13, 14
Elliott v. *Perez*, 751 F.2d 1472 (5th Cir. 1985)	17
Elliott v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992)	9, 10, 12, 13, 16
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	11, 12
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)	12
Holland v. *United States*, 348 U.S. 121 (1954)	14
Jordan by Jordan v. *Jackson*, 15 F.3d 333 (4th Cir. 1994)	17
Kartseva v. *Department of State*, 37 F.3d 1524 (D.C. Cir. 1994)	11, 16
Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993)	16, 17
Oropallo v. *Parrish*, 1994 WL 168519 (1st Cir. May 5, 1994)	18
Poe v. *Haydon*, 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989)	13
Sapp v. *Cunningham*, 847 F. Supp. 893 (D. Wyo. 1994)	18

Cases—Continued: Page

Schultea v. *Wood*, 27 F.3d 1112 (1994), reh'g en banc granted, No. 93-2186 (5th Cir.) 17
Siegert v. *Gilley*:
895 F.2d 797 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991) 8, 12
500 U.S. 226 (1991) 12, 14
Tompkins v. *Vickers*, 26 F.3d 603 (5th Cir. 1994) 12, 13
United States Postal Service Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 14
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 14
Wyatt v. *Cole*, 112 S. Ct. 1827 (1992) 14

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I 7, 8
Amend. V 8
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 8
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2511 8
42 U.S.C. 1983 ..... 1, 17
28 C.F.R.:
Sections 540.60-540.65 5
Section 540.104 7
Sections 542.10-542.16 3
Fed. R. Civ. P.:
Rule 8(a)(2) 16
Rule 9(b) 16, 17

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The United States has important interests in the law relating to qualified immunity, including the pleading and evidentiary standards challenged in the petition in this case. Qualified immunity may apply in civil actions against federal personnel in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials under 42 U.S.C. 1983. The United States has an interest in protecting government employees from meritless and

unduly burdensome litigation that can interfere with their exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

This case is one of approximately 500 *Bivens* cases filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP).[1] The Bureau consists of 79 prisons, six regional offices, and the Central Office in Washington, D.C. The majority of Bureau personnel are line staff, such as Correctional Officers, Correctional Counselors, Case Managers, and Unit Managers. The responsibilities of line staff require close daily contact with the inmate population and call upon the staff to exercise discretion in preserving inmate discipline and providing for the needs of inmates and the safety and security of inmates and staff. The Bureau trains and encourages its line staff to interact frequently with inmates in order to anticipate and resolve conflicts without unnecessary confrontations. Programming and administrative staff also have frequent, close interaction with inmates; the discipline and other restrictions those officials impose, and the services they provide—including intake and assignment to living quarters, provision of health care, and supervision of educational and work activities—have an important impact on inmates' conditions of confinement. Prison administrators, regional staff, and Central Office

[1] Claims are also made in this case against respondent Loye W. Miller, Jr., former Director of Public Affairs at the Department of Justice, who was not a BOP official.

staff make policy and management decisions that affect local staff action, and, in turn, the inmates themselves. Administrators also make appeal decisions in disciplinary cases and other administrative claims. See generally 28 C.F.R. 542.10-542.16.

The contact of all levels of BOP staff with inmates in the often adversarial environment of incarceration generates numerous allegations by inmates that actions were taken against them for unlawful reasons. Many of these allegations are unfounded. The comprehensive control exercised by prison staff over the inmate population also carries with it the risk that staff members may at times abuse their authority and violate inmates' constitutional rights. Careful accommodation is required between preserving the right to redress for constitutional violations, when such violations occur, and limiting the impact of meritless inmate claims that may be costly to litigate, that may impose severe burdens on institutional management, and that may also impose substantial litigation burdens on individual defendants.

2. The district court's decision in this case was rendered in response to respondents' motion for summary judgment. That court was therefore required, as was the court of appeals, to view the evidence in the light most favorable to petitioner. Except where indicated, the following summary of the facts is taken from the court of appeals' opinion (Pet. App. 3a-7a).

The events giving rise to this case began shortly before the November, 1988, presidential election. Petitioner was incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma, serving a 51-year sentence for drug and explosives violations. He was placed in administrative detention on three different occasions before and after the election.

He alleges that those placements were either intended to deny him access to the press or were in retaliation for his exercise of free speech rights. Respondents, on the other hand, maintain that the detentions were motivated by lawful official purposes—to ensure petitioner's safety and in response to charges that petitioner had violated prison rules regarding "third party" telephone calls. Pet. App. 7a.

More than a week before the election, petitioner spoke by telephone with journalist Nina Totenberg and claimed that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. Totenberg arranged for petitioner to make an affidavit recounting his version of events, which she showed to high-level members of the Bush/Quayle campaign. Totenberg did not broadcast the story, however, because she could not corroborate it. Pet. App. 3a, 21a-22a; C.A. App. 79.

Other news organizations heard of petitioner's allegations. On November 3, the Thursday before the election, NBC News contacted El Reno officials and requested an in-person interview with petitioner. El Reno officials offered to arrange an interview on November 8, election day, but NBC responded that that would be too late, and threatened to run a "cover-up" story if an earlier interview were not arranged. On Thursday, November 3, the Bureau's Central Office instructed El Reno officials to arrange for an earlier interview, and NBC taped an interview with petitioner on Friday, November 4.[2] NBC

---

[2] In a July 13, 1990, letter to Time Magazine, C.A. App. 92, and in an August 31, 1990, letter to Congressman Robert W. Kastenmeier, C.A. App. 107, respondent J. Michael Quinlan, then-Director of the BOP, stated that he concurred in and facilitated the BOP's decision to arrange for the earlier interview.

ultimately decided not to broadcast the story. Pet. App. 3a, 22a; C.A. App. 12-13, 94.

After the NBC interview, other media organizations sought to interview petitioner. El Reno's Acting Warden suggested that a group interview be set up to make it less burdensome on the institution to handle the volume of inquiries. The Executive Assistant to the El Reno Warden told petitioner on November 4 that he would set up a "press conference" for that evening at 7:00 p.m. Pet. App. 4a, 22a.

On either November 3 or November 4, Bush/Quayle campaign officials learned of petitioner's allegations and a campaign official telephoned the Bureau "for additional information" and learned of the November 4 NBC interview. Pet. App. 3a; C.A. App. 96. The campaign Press Secretary spoke with respondent Loye Miller, the then-Director of Public Affairs at the Department of Justice, and said he was "amazed" that petitioner was to hold a press conference. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." Pet. App. 4a, 26a-27a. However, respondent J. Michael Quinlan, then-Director of the BOP, instructed the El Reno authorities to cancel the press conference because he believed "the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." *Id.* at 4a; C.A. App. 95; see 28 C.F.R. 540.60-540.65. Quinlan stated that he had not allowed an inmate press conference during his tenure as BOP Director. Pet. App. 4a.

a. *November 4 Detention.* At approximately 11:30 p.m. on November 4, petitioner was placed in administrative detention at Quinlan's direction, pending investigation of allegations that petitioner had told a news

reporter that petitioner was in danger. Pet. App. 5a; C.A. App. 67. The administrative detention order by El Reno officials recited that petitioner had "stated to the National news media this [sic] his life is in danger and so is being placed in Administrative Detention for his protection." Pet. App. 5a, 24a; C.A. App. 48. Petitioner contends that he was expressly prohibited from making telephone calls until the afternoon of November 5. Pet. 6; Pet. App. 24a; C.A. App. 74.[3] While petitioner was in detention, the Bush/Quayle campaign Press Secretary again called Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." Pet. App. 5a-6a; C.A. App. 85. According to Miller, however, the Press Secretary "did not try in any way to influence the department's handling of Kimberlin." Pet. App. 6a; C.A. App. 85. Petitioner was released from administrative detention at 7:30 p.m. on Saturday, November 5. Pet. App. 6a, 23a.

b. *November 7 Detention.* After he was released from administrative detention on November 5, petitioner made several telephone calls in order to schedule a group telephone interview with reporters, who planned to gather for that purpose at the Mayflower Hotel in Washington, D.C., on the morning of Monday, November 7. Pet. App. 23a. At approximately 9:00 a.m. on

---

[3] In responses to requests for admissions filed in 1993, after the issuance of the district court order denying respondents' motion to dismiss or for summary judgment, petitioner admitted that he was briefly removed from his detention cell on the afternoon of November 5 in order to telephone Nina Totenberg. Plaintiff's Responses to Defendants' Request For Admissions, Question 1 (Feb. 16, 1993).

November 7, before the group telephone interview took place, petitioner was again placed in administrative detention, where he remained for seven days. C.A. App. 75. Petitioner contends that he was not authorized to make telephone calls during that time, except to his lawyer. *Ibid.*[4] The reason given for that detention was violation of a prison regulation prohibiting inmates from making third-party telephone calls, *i.e.*, calls made to one party, and then electronically transferred by that party to a third party. Pet. App. 6a (citing 28 C.F.R. 540.104). On November 14, after an administrative hearing at which petitioner was found guilty of violating the telephone regulation, he was released from administrative detention. Pet. App. 6a, 25a-26a.

c. *December 22 Detention.* Petitioner was again placed in administrative detention on December 22, the day after he held two telephone interviews, and a few days after news stories appeared recounting his conflicts with prison officials. The reason given was violation of the prohibition on third-party telephone calls. Petitioner was released from detention on December 23, and was found not guilty of the violation because there was "no specific evidence that [he] intentionally placed a conference/third-party call." Pet. App. 6a-7a.

3. On August 15, 1990, petitioner filed suit including, *inter alia*, a *Bivens* claim that respondents had placed him in detention in violation of his First Amendment

---

[4] Although petitioner contends that he was denied comunication with the news media, his subsequent responses to requests for admissions reflect that, "at some point during his detention, prison officials briefly removed [petitioner] from his cell and brought him to the office of [the Executive Assistant to the El Reno Warden], where he was interviewed on camera" by a member of the news media. Plaintiff's Responses to Defendants' Request For Admissions, Question 17 (Feb. 16, 1993).

rights.[5] Respondents promptly moved to dismiss or for summary judgment on grounds of qualified immunity. The district court stayed discovery relating to the *Bivens* claims pending resolution of the qualified-immunity question. Pet. App. 2a; see C.A. App. 3 (referring to order dated 11/26/90).[6]

On August 6, 1991, the district court held that respondents were not entitled to qualified immunity. Pet. App. 44a-62a. "[I]f [respondents] were motivated by a purpose to keep [petitioner] from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attach[] to their actions." *Id.* at 48a. The court held that a heightened pleading standard applied to *Bivens* claims based on unconstitutional motive, requiring "allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial)." *Id.* at 52a. Petitioner, in the court's view, met that standard. *Id.* at 53a-56a. Reasoning that the decision of the District of Columbia Circuit in *Siegert* v. *Gilley*, 895 F.2d 797 (1990), aff'd on other grounds, 500 U.S. 226 (1991), was "susceptible of more than one interpretation," the district court did not apply *Siegert*'s "direct evidence" rule. Pet. App. 50a. It

---

[5] Petitioner also brought a *Bivens* claim of violation of his Fifth Amendment due process rights, and claims against the United States and respondent Quinlan, in his official capacity as BOP Director, under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511. Only the First Amendment *Bivens* claims are involved in the petition.

[6] Discovery relating to the non-*Bivens* claims was not, however, stayed, and discovery that petitioner obtained relating to his other claims also proved relevant to his *Bivens* claims.

held that *Siegert* should not be read to require a *Bivens* plaintiff to plead direct evidence, because "circumstantial evidence is intrinsically no different than direct evidence." *Id.* at 52a. Because of its denial of qualified immunity, the court lifted the discovery stay. *Id.* at 63a.

4. Respondents took an interlocutory appeal, and the court of appeals reversed. Pet. App. 1a-43a. In a divided decision, the court held that an elevated standard of pleading and proof applies where a plaintiff "sues government officials and alleges unconstitutional motive." *Id.* at 8a. That standard requires "pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment." *Id.* at 9a.[7] Petitioner failed to meet that standard because he did not proffer "*direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence." *Id.* at 12a-13a. Petitioner "relie[d] only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by [respondents]." *Id.* at 17a.[8]

Judge Williams, concurring, stated that the court's decision was mandated by circuit precedent, but added that "[t]his is not to say that circuit law is correct."

---

[7] The court noted that, although other circuits had "refrain[ed] from adopting the direct/circumstantial distinction," most circuits had adopted some form of heightened pleading standard. Pet. App. 9a-10a.

[8] The court noted that, "as [applied] here, at the summary judgment stage, the expression 'heightened pleading' is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading." Pet. App. 9a n.8 (citing *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992)).

Pet. App. 17a. He described the direct evidence rule as an effort to effectuate the purpose of qualified immunity to create "an especially high threshold" before government officials are exposed to burdensome discovery regarding their motivation. *Id.* at 17a-18a. He observed, however, that "[t]he distinction between direct and circumstantial evidence * * * appears completely arbitrary and unrelated to the strength of the plaintiff's case," and found it "hardly surprising that the only circuits to consider our direct evidence rule have rejected it." *Id.* at 18a (citing *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); *Branch* v. *Tunnell*, 937 F.2d 1382, 1386-1387 (9th Cir. 1991)). He concluded that "[i]f the direct evidence rule is reexamined *en banc*, * * * the reconsideration should encompass alternatives." *Id.* at 19a.

Judge Edwards dissented. Pet. App. 19a-43a. In his view, "a 'direct evidence rule' finds no support in the Federal Rules, is at odds with Supreme Court precedent, defies the case law of this and other circuits, and is a nonsensical notion." *Id.* at 30a.

5. The court of appeals denied petitioner's suggestion for rehearing en banc. Pet. App. 64a-75a. In a statement concurring in the denial of rehearing en banc, Judge Williams, joined by Judges Silberman and Buckley, stated that "[t]he imperfections of our 'direct evidence' rule are plain to see," *id.* at 65a, but concluded that "it seems to me on balance preferable to continue with the imperfections of [the District of Columbia Circuit's holding in] *Siegert* until the Supreme Court resolves the issue," *id.* at 66a-67a. Judge Silberman also wrote a statement concurring in the denial of rehearing en banc, in which he recognized that "[t]hose who criticize this circuit's direct versus circumstantial evidence

distinction * * * have a logical point," but concluded that "the Supreme Court is better positioned than we to resolve the broader problem." *Id.* at 67a. Judge Edwards, joined by Chief Judge Mikva and Judge Wald, dissented from the denial of rehearing en banc. He concluded that "[t]his court is bound by Supreme Court precedent, by fidelity to our own precedents, and by simple logic, both to rehear and revise *Kimberlin* v. *Quinlan*. It is my hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit." *Id.* at 74a-75a.

DISCUSSION

1. Certiorari should be granted, limited to the second question presented, regarding the District of Columbia Circuit's "direct evidence" rule. The District of Columbia Circuit generally requires "heightened pleading" in *Bivens* cases. Under that standard, a plaintiff must—after a qualified-immunity defense is raised—allege a constitutional violation with sufficient detail to permit the district court to determine whether the claims should proceed to discovery. See *Kartseva* v. *Department of State*, 37 F.3d 1524, 1531 (D.C. Cir. 1994). The Circuit's direct evidence rule constitutes an additional requirement in *Bivens* cases in which motive is an element of the constitutional claim. The rule requires that plaintiffs in such cases plead and present direct as opposed to circumstantial evidence of the alleged unconstitutional motive.[9]

---

[9] The direct evidence rule, like the heightened pleading standards that courts of appeals apply to motive-based claims, see pp. 15-16, *infra*, was a judicial response to this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Harlow* held that the test for determining the availability of qualified immunity is an objective one, turning not on the official's subjective "good faith," but on whether the right asserted was clearly established. *Id.* at

The decision in this case imposing the requirement of direct evidence conflicts with decisions of the four other circuits to have considered whether plaintiffs in *Bivens* cases in which motive is an essential element of the constitutional claim must plead or prove such motive on the basis of non-circumstantial evidence. Those circuits have expressly rejected the District of Columbia Circuit's direct evidence rule. See *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994); *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (9th Cir. 1991); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); *Crutcher* v. *Kentucky*,

---

818. That decision recognized that, so long as determination of the official's state of mind was an element of the immunity defense, application of immunity would require "[j]udicial inquiry into subjective motivation," *id.* at 817, thus often imposing discovery burdens on officials. Neither *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified-immunity defense is raised. Some courts of appeals have reasoned that, just as the pre-*Harlow* "good faith" standard potentially conflicted with the purpose of immunity to avoid litigation burdens, allowing discovery into an official's motive in cases where that motive is an element of the constitutional claim might impose "precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see *Branch* v. *Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991); *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); see also *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring in the judgment) ("There is a tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it."). The District of Columbia Circuit's direct evidence rule was a response to that concern. See *Siegert* v. *Gilley*, 895 F.2d 797, 801-802 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991).

883 F.2d 502, 504 (6th Cir. 1989). In *Elliott*, the Seventh Circuit stated:

> Although the [District of Columbia Circuit's] opinion in *Siegert* insisted that the plaintiff produce "direct" evidence of the defendant's improper intent, we agree with Justice Kennedy['s] [opinion concurring in the judgment in *Siegert*] that there is no principled difference between direct and circumstantial evidence. Requiring "direct" evidence of intent would be fatal in all but the rare case in which the defendant confessed.

937 F.2d at 345 (citations omitted). The Ninth Circuit similarly concluded in *Branch I*:

> We disagree * * * with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial evidence. * * * Because evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal.

937 F.2d at 1386-1387. See also *Tompkins*, 26 F.3d at 609 ("We agree with those Circuits that have rejected the argument that a plaintiff must produce direct evidence in a case such as this. Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent.").[10] The District of Columbia Circuit alone

---

[10] Although the Sixth Circuit in *Poe* v. *Haydon*, 853 F.2d 418, 432 (1988), cert. denied, 488 U.S. 1007 (1989), stated that "the plaintiff must present direct evidence that the officials' actions were improperly motivated" in order to defeat a motion asserting qualified immunity, that court subsequently construed *Poe* to allow

requires that a plaintiff plead and present direct as opposed to circumstantial evidence in these cases.

We believe that the requirement of direct (as opposed to circumstantial) evidence in this context is incorrect, and warrants this Court's review. As Justice Kennedy recognized in his opinion concurring in the judgment in *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991), the District of Columbia Circuit's direct evidence rule appears to conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954).[11] *Holland* held that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." *Id.* at 140.[12] That principle is well established in the law governing proof of purpose or intent.[13] An opposing party's state of mind is,

---

a plaintiff to rely on "inferential and circumstantial proof" alone. *Crutcher*, 883 F.2d at 504.

[11] See also *Siegert*, 500 U.S. at 246 (Marshall, J., dissenting) ("the Court of Appeals erred in holding that a district court may not permit limited discovery in a case involving unconstitutional motive unless the plaintiff proffers *direct* evidence of the unconstitutional motive").

[12] The *Holland* Court stated that, "[a]dmittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." 348 U.S. at 140. See also *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring) (the question of intent "is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case").

[13] See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and direct evidence is not required); *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the

by its nature, difficult to prove, and is most often proved by circumstantial evidence. In his brief in *Siegert* v. *Gilley*, the Solicitor General thus took the position that the decision of the court of appeals in that case should not be read to require direct evidence, because such a requirement would conflict with *Holland*. Brief for the Respondent at 20 n.13 (No. 90-96). We continue to adhere to the view that the direct evidence rule is incorrect.

Three of the judges on the District of Columbia Circuit who supported the decision below also questioned the validity of the direct evidence requirement. Judge Williams, concurring in the panel decision, adhered to the direct evidence rule as the law of the circuit, but stated that "[t]he distinction between direct and circumstantial evidence * * * appears completely arbitrary and unrelated to the strength of the plaintiff's case." Pet. App. 18a. Judges Silberman and Buckley joined Judge Williams in his statement supporting the denial of rehearing en banc, in which he reiterated that "[t]he imperfections of our 'direct evidence' rule are plain to see." *Id.* at 65a; see also *id.* at 67a (Silberman, J., concurring) ("Those who criticize this circuit's direct versus circumstantial evidence distinction * * * have a logical point."). Each of the three opinions concurring in or dissenting from the denial of rehearing en banc called on this Court to review the issue. *Id.* at 66a-67a, 67a, 74a-75a.

2. The issue with regard to the first question presented by the petition for certiorari is whether a plaintiff asserting a *Bivens* claim of which motive is an element must make allegations with heightened specificity at the pleading stage. Several courts of

---

plaintiff may prove his case by direct or circumstantial evidence. * * * [T]he District Court should not have required [the plaintiff] to submit direct evidence of discriminatory intent.").

appeals, including the District of Columbia Circuit, have held that, in cases in which the defense of qualified immunity is raised, more than bare, conclusory allegations of unconstitutional motive are required. See, *e.g.*, *Branch* v. *Tunnell* (*Branch II*), 14 F.3d 449, 452 (9th Cir.) ("[I]n order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity."), cert. denied, 114 S. Ct. 2704 (1994); *Elliott*, 937 F.2d at 344-345 (requiring the plaintiff "to produce 'specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal'").[14] There appears to be no circuit conflict on the issue of whether heightened pleading of motive-based claims is required once an immunity defense has been raised. In addition, the issue of whether the pleading in this case was sufficiently specific to satisfy that test was not addressed by the court below and is not raised by the facts of this case.

a. In *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), this Court unanimously rejected a judicially fashioned requirement of heightened pleading of civil rights claims generally. Because Federal Rule of Civil Procedure 9(b) imposes a requirement of pleading with heightened particularity only in two specified contexts—claims of fraud or mistake—and does not similarly impose such a

---

[14] The District of Columbia Circuit has not limited the heightened pleading standard (as opposed to the direct evidence rule) to "claims in which the outcome depends on the defendant's state of mind," but held that it "applies to all *Bivens* or [42 U.S.C.] 1983 claims." *Kartseva*, 37 F.3d at 1531.

requirement on claims of municipal liability under 42 U.S.C. 1983, *Leatherman* held that Section 1983 claims are governed by the Rule 8(a)(2) regime of "notice pleading." 113 S. Ct. at 1163. *Leatherman* expressly reserved the question whether the same logic would apply to claims to which qualified immunity may be a defense. *Id.* at 1162 (because municipalities enjoy no immunity from suit, "[w]e * * * have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials").

Several courts since *Leatherman* have relied on this Court's reservation of the issue and have continued to adhere to standards of heightened pleading in the qualified-immunity context. See, *e.g.*, *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (continuing, in light of *Leatherman*, to require that complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Schultea* v. *Wood*, 27 F.3d 1112, 1115 n.2 (1994) (same), reh'g en banc granted, No. 93-2186 (5th Cir.); *Branch II*, 14 F.3d at 452, 455-457 (adhering after *Leatherman* to requirement set forth in *Branch I* that the "complaint contain nonconclusory allegations" of defendant's scienter); Pet. App. 9a n.9.[15] The cases that petitioner contends rely on *Leatherman* to reject

---

[15] See also *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994) (distinguishing in dictum the pleading question in qualified-immunity cases from the claim of municipal liability there at issue); cf. *Elliott* v. *Perez*, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring specially) (stating, in light of the limited scope of Rule 9(b), that "I do not know where we find the authority to add the requirement that claims against officials who enjoy immunity from suit shall be pled with particularity").

heightened pleading in the qualified-immunity context (Pet. 16-17) do not, in fact, conflict with these holdings; those cases, although they dealt with claims against individual officials, did not explicitly address the effect of a qualified-immunity defense. See, *e.g.*, *Black* v. *Lane*, 22 F.3d 1395 (7th Cir. 1994); *Oropallo* v. *Parrish*, 1994 WL 168519 (1st Cir. May 5, 1994).[16] In view of the absence of a circuit conflict on this issue, we believe that there is no need for the Court to address it at this time.

b. Furthermore, even if there were a conflict, this case is not an appropriate vehicle for reviewing whether a plaintiff raising motive-based constitutional claims to which qualified immunity may be a defense is required to plead his or her claims with greater specificity than would otherwise be required. The complaint and other pleadings in this case are not conclusory, but instead contain detailed and specific allegations. The issue raised and decided below did not concern the specificity of petitioner's allegations, but whether petitioner should be required to plead and present direct as opposed to circumstantial evidence. The District of Columbia Circuit held that a plaintiff raising a motive-based *Bivens* claim must produce direct evidence of improper motive to proceed with discovery on that claim. Pet. App. 17a. That ruling neither raises nor resolves the question whether, apart from a direct evidence requirement, a complaint must be pled with heightened specificity where qualified immunity may be a defense. In addition,

---

[16] Petitioner also cites several district court cases as extending *Leatherman* (Pet. 17 n.13), some of which simply did not address qualified immunity, and none of which have been accepted by any courts of appeals. See, *e.g.*, *Sapp* v. *Cunningham*, 847 F. Supp. 893, 900 n.9 (D. Wyo. 1994) (holding that *Leatherman* overruled the Tenth Circuit's heightened pleading standard even for individual-capacity claims subject to qualified-immunity defense).

the fact that petitioner obtained documents during a period when discovery on the *Bivens* claims was stayed (but discovery on non-*Bivens* claims was going forward) puts this case in a highly unusual posture. The issue in the typical *Bivens* case at the same procedural stage is whether discovery should go forward or whether the case should be dismissed before discovery. The court of appeals' decision in this case, however, did not completely preclude petitioner from conducting discovery.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question 2 in the petition for a writ of certiorari.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T. L. PILLARD
Assistant to the Solicitor General

JANUARY 1995

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT
Counsel of Record
ELLEN S. WINTER
KATHLEEN M. GRABER
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity?

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct," as opposed to persuasive circumstantial, evidence of unlawful motive?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 18

ARGUMENT 21

THE COURT OF APPEALS ERRED BY REQUIRING *BIVENS* PLAINTIFFS TO SUBMIT "DIRECT" EVIDENCE OF INTENT 21

A. The Decision Below Is Contrary To This Court's Perceived Need To Strike A Satisfactory Balance That Protects Both Citizens And Officials 21

B. This Court's Discerning Approach To Qualified Immunity Requires Reversal 24

C. The "Direct Evidence" Standard Is Contrary To Settled Principles 28

D. The Direct Evidence Standard Has Been Universally Rejected In *Bivens* Cases 32

E. The "Direct Evidence" Rule Strikes An Incorrect Balance And Is Counterproductive To Its Stated Purpose 34

F. The Court Of Appeals Erred By Fashioning A "Heightened Pleading" Standard Contrary To The Federal Rules of Civil Procedure 36

G. This Court Should Articulate A Standard That More Appropriately Balances the Competing Objectives 39

CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Abrams v. United States, 250 U.S. 616 (1919).....23

American Communications Ass'n v. Douds, 339 U.S. 382 (1950).....30

Anderson v. Creighton, 483 U.S. 635 (1987).....21, 41

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....38

Batiste v. Colonial Sugars, Inc., No. 92-3513, 1993 U.S. Dist. LEXIS 6038 (E.D. La. May 5, 1993).....37

Batson v. Kentucky, 476 U.S. 79 (1986).....31

Baxter v. Vigo County School Corp., 26 F.3d 728 (7th Cir. 1994).....37

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....8, 23, 24

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994).....37

Bond v. Floyd, 385 U.S. 116 (1966).....23

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991), *appeal after remand*, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994).....33, 40

Brooks v. Andolina, 826 F.2d 1266 (3d Cir. 1987).....9

Butz v. Economou, 438 U.S. 478 (1978) 23, 25, 38

Callaghan v. Congemi, No. 91-1496, 1993 U.S. Dist. LEXIS 4819 (E.D. La. Apr. 8, 1993) 37

Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993) 31

Cox v. Louisiana, 379 U.S. 559 (1965) 31

Crutcher v. Kentucky, 883 F.2d 502 (6th Cir. 1989) 34

Denny v. Hilton, 131 F.R.D. 659 (M.D.N.C. 1990), *aff'd mem. sub nom. Denny v. Elliott*, 937 F.2d 602 (4th Cir. 1991) 39

Dodson v. City of Kenner, No. 92-3530:E/6, 1993 U.S. Dist. LEXIS 6077 (E.D. La. May 5, 1993) 37

Dowell v. Tennessee, No. 92-6125, 1993 U.S. App. LEXIS 11715 (6th Cir. May 18, 1993) 39

Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) 36

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992) 33, 40, 41

Elmore v. McCammon, 640 F. Supp. 905 (S.D. Tex. 1986) 39

Farmer v. Brennan, 114 S. Ct. 1970 (1994) 30

Ferrer v. Zayas, 914 F.2d 309 (1st Cir. 1990) 31

Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984) 39

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....*passim*

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).....29

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).....26

Holland v. United States, 348 U.S. 121 (1954).....28, 31

In re Tyler, 839 F.2d 1290 (8th Cir. 1988).....39

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).....30

Jackson v. Carpenter, 921 F.2d 68 (5th Cir. 1991).....39

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993).....16, 36, 38

Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir. 1987).....26-27

Maxey v. Murray, No. 93-17346, 1994 U.S. App. LEXIS 25262 (9th Cir. Sept. 7, 1994).....40

McCallen v. Holland-Hull, No. 93-3415, 1994 U.S. Dist. LEXIS 1364 (E.D. Pa. Jan. 27, 1994).....37

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960).....28, 31

Mitchell v. Forsyth, 472 U.S. 511 (1985).....24-25

Mohid v. Wheatley, No. 3:92-CV-2284-H, 1993 U.S. Dist. LEXIS 5285 (N.D. Tex. Apr. 20, 1993).....37

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 31

NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) 31

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 22, 23

Procunier v. Martinez, 416 U.S. 396 (1974) 9

Rankin v. McPherson, 483 U.S. 378 (1987) 23

Resolution Trust Corp. v. North Bridge Associates, 22 F.3d 1198 (1st Cir. 1994) 41

The Robert Edwards, 19 U.S. (6 Wheat.) 187 (1821) 28, 31

Rogers v. Lodge, 458 U.S. 613 (1982) 31

Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) 31

Sapp v. Cunningham, 847 F. Supp. 893 (D. Wyo. 1994) 38

Siegert v. Gilley, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991) ..... *passim*

Texas v. Johnson, 491 U.S. 397 (1989) 23

Tompkins v. Vickers, 26 F.2d 603 (5th Cir. 1994) 34

Tuite v. Henry, No. 93 C 3248, 1994 U.S. Dist. LEXIS (N.D. Ill. Feb. 11, 1994) 37

Turner v. Safley, 482 U.S. 78 (1987) 9

United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).....23

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).....31

United States Postal Service Board v. Aikens, 460 U.S. 711 (1983).....29, 30

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).....29, 30

Walker v. Trammel, No. 92-2763, 1993 U.S. App. LEXIS 22909 (7th Cir. Aug. 30, 1993).....40

Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1938 (1990).....27

Wicks v. Mississippi State Employment Services, 41 F.3d 991(5th Cir. 1995).....40

Wright v. Jefferson County Police Department, No. 92-6203, 1993 U.S. App. LEXIS 32556 (6th Cir. Dec. 8, 1993).....41

Wyatt v. Cole, 112 S. Ct. 1827 (1992).....33

STATUTES AND REGULATIONS

18 U.S.C. § 2510 (1988).....8

18 U.S.C. § 2511 (1988).....8

28 U.S.C. § 1254(1)(1988).....2

28 U.S.C. § 1915(d)(1988).....39

Sedition Act of 1798, ch. 73, 1 Stat. 596 23

28 C.F.R. § 540.105 (1988) 5

28 C.F.R. § 540.62(b) (1994) 3

28 C.F.R. § 540.63(f) 3

28 C.F.R. § 540.63(h)(4) 4,10

28 C.F.R. § 540.63(j) 4

28 C.F.R. § 541.13 14

28 C.F.R. § 541.22(a) 14

OTHER AUTHORITIES

U.S. Const. art. I 2

Fed. R. Civ. P. 8a. 2

Fed. R. Civ. P. 9(b) 2, 29

Fed. R. Civ. P. 11 39

Fed. R. Civ. P. 56 ..... 2, 41

Thomas I. Emerson et al., *Political and Civil Rights in the United States* (1967) 22

John C. Miller, *Crisis in Freedom* (1951) 22

James M. Smith, *Freedom's Fetters* (1956) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The concurring and dissenting opinions on petitioner's suggestion for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. Pet. App. 79a. A timely petition for rehearing was denied on April 1, 1994. *Id.* at 64a-

75a. The petition for a writ of certiorari was filed on June 22, 1994, and was granted on January 20, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rules 8(a), 9(b) and 56 of the Federal Rules of Civil Procedure are reproduced at Pet. App. 76a-78a.

STATEMENT

1. Several weeks before the 1988 Presidential election, petitioner, an inmate in a federal correctional facility, agreed to provide an affidavit to a reporter detailing potentially damaging allegations about the Republican candidate for Vice President. CA App. 79. When the reporter sent a copy of the affidavit to the Bush-Quayle Campaign, the Campaign's Deputy Press Secretary, Mark Goodin, promptly alerted Campaign Chairman James Baker that "[t]here's an issue that has come up that I think requires your attention." *Id.* at 100. Goodin also

showed the affidavit to Stuart Spencer, Senator Quayle's Campaign Manager, Lee Atwater, Bush-Quayle Campaign Manager, and other senior officials of the campaign; and he "made it very clear" that "it was something that we needed to take seriously and deal with seriously because of its potential for adverse publicity." *Id.* at 99A, 103, 171.

On Thursday, November 3, 1988, NBC News requested permission from the Bureau of Prisons to interview petitioner.[1] When the Bureau initially refused to permit an interview until after the election, NBC replied that it would broadcast petitioner's allegations "with the additional twist that the Bureau was preventing the interview until after the election to protect the Quayle candidacy." *Id.* at 94. Respondent Quinlan, the Director of the Bureau, allowed the interview to proceed (with the expectation that it would not air). As he has acknowledged *(id.)*:

> Kimberlin's fundamental lack of credibility, and the likelihood of unnecessarily precipitating a "cover-up" story just before the election, were major factors in the decision to permit the original NBC interview on an earlier schedule than El Reno had originally proposed. That judgment has been borne out by the fact that no news outlet carried the story in the pre-election period.

---

[1] Bureau regulations authorize on-camera interviews of prison inmates. 28 C.F.R. § 540.62(b). The regulations require the warden to approve or disapprove the interview within 24 to 48 hours of the request. 28 C.F.R. § 540.63(f).

NBC conducted a forty-five minute interview with petitioner the next morning, Friday, November 4, 1988. It was subject to continuous auditory supervision by the Executive Assistant to the Warden (*id.* at 49), although Bureau regulations provided: "Interviews are not subject to auditory supervision." 28 C.F.R. § 540.63(j). As Director Quinlan anticipated, NBC did not broadcast the interview. CA App. 94.

Upon learning of the NBC interview, several other reporters contacted the prison on November 4 requesting to interview petitioner. *Id.* at 67; App., *infra*, A4. "[T]he Acting Warden suggested that a joint interview be set up to reduce the strain on institution resources of handling each interview separately." CA App. 67. In his view, a single group interview would best accommodate the press request consistent with prison management and security. *Id.* Bureau regulations authorize the wardens to schedule group interviews. 28 C.F.R. § 540.63 (h) (4).[2]

The prospect of a "group interview" created a sense of urgency at Bush-Quayle Campaign headquarters because of the belief "that it was just a question of time before this story broke . . . ." CA App. 104A. The Campaign's Deputy Press Secretary called respondent Miller, Director of Public Affairs at the Department of Justice, and "noted the obvious: that the closer to the Tuesday election that the story

---

[2] The Bureau's regulations provide that the Warden may "[l]imit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution." 28 C.F.R. § 540.63(h)(4).

were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." *Id.* at 85. The campaign official specifically complained that "[t]his Kimberlin fellow apparently is going to have a press conference. I'm amazed." *Id.* at 105. Respondent Miller answered: "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.*

Communications to and within the Department of Justice continued. Campaign officials contacted the Bureau of Prisons directly. *Id.* at 96. In addition, respondent Miller contacted the Bureau. *Id.* at 82. He also alerted the Executive Assistant to the Attorney General, Robin Ross. *Id.* at 170 n.12; Pet. App. 54a.

Director Quinlan stepped into the situation by taking some extraordinary actions. First, he countermanded the Acting Warden's decision and personally canceled the group interview. CA App. 95; App., *infra*, A5. Then, at approximately 11:00 p.m., on Friday, November 4, respondent Quinlan, in an unprecedented move for a Director, ***personally*** ordered petitioner locked into an isolated, cramped detention cell known as "the hole." CA App. 170, 73; App., *infra*, A6. While confined, petitioner was denied use of the telephone, isolated from the general population and stripped of all normal privileges, in violation of Bureau regulations.[3] CA App. at 76. For most of his time in isolation,

---

3 The applicable regulation provided: "The Warden shall establish procedures for allowing inmates in . . . segregation status to make phone calls . . . ." 28 C.F.R. § 540.105 (1988).

petitioner was not permitted to use the telephone at all. An order provided: "NO! MORE PHONE CALL FOR THIS INMATE, per Lt. Garvue." *Id.* at 87.

In the history of the Bureau of Prisons, "this was the first time that the Director, who oversees some 45,000 federal inmates nationwide, had made a decision to place an inmate in one of the many institutions under his control in administrative detention." Pet. App. 54a. The Director's orders were carried out by officials who wrestled petitioner from his room, handcuffed him, "wheelbarrow marched" him to detention in a painful, hunched over position, denied him proper clothing, and subjected him to a strip search. *Id.* at 23a.

Petitioner was momentarily released from detention the following evening, Saturday, November 5, because a reporter told the Department of Justice she would broadcast his allegations unless he were released (CA App. 84):

> [The reporter] strongly implied that there was a quid pro quo here -- that we had better let him out of solitary (our prison authorities called it "detention," I believe) or we would trigger an NPR report publishing Kimberlin's allegations about Quayle. . . .
>
> . . . .
>
> I [respondent Miller] did relate to the bureau virtually everything [the reporter] had just told me.

Upon his release, petitioner made plans to telephone a group of reporters assembled at a hotel in

Washington, D.C. at 10:00 a.m. on the day before the election, Monday, November 7. *Id.* at 74; App., *infra*, A9. Bureau officials discovered these plans by wiretapping petitioner's telephone conversations. *Id.* at. 68-69; Pet. App. 55a. Respondent Miller has acknowledged that, "by that stage of the game, the prison authorities were monitoring all" of petitioner's telephone calls. CA App. 85. On the day before the election, the prison sent to respondent Quinlan seven tape cassettes containing recordings of petitioner's telephone conversations, including conversations with reporters. *Id.* at 111.

The Deputy Press Secretary of the Bush-Quayle Campaign communicated his concern about petitioner's plans directly to respondent Miller (*id.* at 85):

> On Sunday, Goodin told me that instead of staying in the campaign office -- his normal role -- he planned to spend Monday traveling with Quayle during his final day of campaigning, to take a direct hand in handling the media relations if the story of the Kimberlin charges should break. If that occurred, they planned to have Quayle immediately drop whatever he was doing and hold a press conference to deny the charges.

Petitioner's call to reporters "was never made, for Kimberlin was placed in detention before it could be made." Pet. App. 55a. This "detention, like the previous one, was ordered personally by Director Quinlan." *Id.* Petitioner was kept in detention until a week after the election. *Id.* at. 6a. On December 22,

1988, petitioner was placed in solitary detention a third time. *Id.* at 6a, 45a.

He filed an administrative claim under the Federal Torts Claim Act, which the Bureau of Prisons denied on June 19, 1990. CA App. 66-71.

2. On July 2, 1990, petitioner filed suit in the United States District Court for the District of Columbia against former senior Justice Department officials Quinlan and Miller. The complaint alleged a *Bivens* action for intentional violations of petitioner's First Amendment rights.[4] Respondents moved to dismiss the complaint or, alternatively, for summary judgment based on an assertion of qualified immunity. In accordance with the procedure for motions involving qualified immunity, the district court stayed all discovery relating exclusively to the *Bivens* claim and prohibited the taking of respondents' depositions.[5] Pet. App. 63a. Respondents contended they were entitled to immunity because petitioner allegedly failed to satisfy the "heightened pleading" standard

---

[4] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint (App., *infra*, A1-A-19, also asserted claims under the Federal Tort Claims Act, 18 U.S.C. § 2511 (1988), the Fifth Amendment, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 (1988). The district court dismissed the Fifth Amendment claim as duplicative of the First Amendment claim, and a portion of the tort claim on grounds of venue; it denied respondents' motion to dismiss the Title III claim. Pet App. 57a-62a. These other claims are not before this Court.

[5] *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed.")

that the District of Columbia Circuit created in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991). That standard requires a *Bivens* plaintiff to submit, prior to discovery, "direct as opposed to merely circumstantial evidence of the intent." *Id.*[6]

In opposition, petitioner submitted internal government documents, affidavits and other evidence that demonstrated respondents' unlawful intent in numerous ways: (1) by showing that respondents' proffered explanations for the confinements were false and contradicted by objective evidence; (2) by showing that respondents' explanation for their actions were repeatedly revised; (3) by showing that respondents were improperly influenced by at least one senior official of the political campaign; (4) by showing that, just before the detention, respondents barred petitioner from meeting with reporters because of the content of his speech; and (5) by showing that respondents' actions violated established Bureau regulations.

---

[6] Respondents also contended that petitioner's First Amendment rights were not "clearly established." They have abandoned that contention. Long before the events in 1988 took place, this Court had established that "[p]rison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *see also Turner v. Safley*, 482 U.S. 78, 90 (1987) (prison rules must "operate[ ] in a neutral fashion, without regard to the content of the expression"); *Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987) (prison officials violated "clearly established constitutional rights" by locking an inmate into detention because of his statements).

Petitioner assembled substantial evidence that respondents' stated explanations for the repeated detentions were wholly pretextual. For example, respondent Quinlan answered Congressional inquiries about his actions by asserting that group press interviews violate Bureau "policy." CA App. 170; Pet. App. 54a. He did not identify the source of this policy and objective evidence shows that group interviews and press conferences were ***not*** against Bureau policy.

First, nothing in the Bureau's regulations prohibits group interviews or press conferences. To the contrary, the regulations leave the decision concerning the number of news reporters who may enter a prison to the discretion of the warden. 28 C.F.R. § 540.63 (h)(4). Here, the Acting Warden had already determined that a group interview was warranted and could be accommodated. Second, respondent Miller told the Bush-Quayle Campaign that it was "within [petitioner's] rights to have one according to the rules and regulations." CA App. 170; Pet. App. 54a. Similarly, the Justice Department's Deputy Director of Public Affairs advised the Campaign that "unless there was an immediate security concern, . . . it was within a prisoner's parameters" to have a group interview. CA App. 104. Third, the Bureau's former General Counsel has acknowledged that group interviews are not barred by Bureau policy and have been allowed in the past. *Id.* at 90. Fourth, reporters at the prison were told that the group interview was canceled because "***unforseen developments*** [had] come up since arrangements for the interview were set up [that] afternoon." *Id.* at 37 (emphasis added). The reporters

were not told that group interviews violated any existing "policy."[7]

Similar discrepancies undercut respondent Quinlan's purported justification for his order to place petitioner in administrative detention. He contended that a reporter communicated to the Department of Justice petitioner's fear for his own safety. *Id.* at 68, 78; Pet. App. 53a. That purported justification was flatly refuted by the reporter, Nina Totenberg, in a sworn declaration (CA App. 80):

> In one conversation with Miller, it became clear to me that the Department was using me as the excuse for the isolation -- that I was supposed to be the person who quoted Kimberlin as saying his life was in danger. I immediately told Loye Miller that was untrue and that I had never said any such thing.

---

[7] Reporters were also given conflicting stories about the extent of internal discussion within the Department of Justice. In response to press inquiries, respondent Miller denied informing the Attorney General's Executive Assistant, Robin Ross, of the interviews and reversed course after learning that Mr. Ross had acknowledged the communication. As Miller wrote: "In his initial questioning, [a news reporter] pressed to know who above me at Justice had been informed about the Kimberlin affair as it unfolded through the weekend. I told him that I hadn't told anyone. Later he informed me that Ross contradicted that by telling [the reporter] that I had informed him about Kimberlin Friday afternoon. I conceded that Ross was indeed correct, that I had forgotten that I had talked to Ross, and that I stood corrected." *Id.* at 86A. In fact, respondent Miller had also informed others at the Department of Justice, including officials of the Bureau of Prisons.

Other circumstances surrounding petitioner's confinement show that it was not motivated by concerns for his safety. For example, petitioner was physically manhandled, handcuffed and strip searched (*id.* at 73; App., *infra*, A7; Pet. App. 54a), all of which is, as the district court observed, "inconsistent with administrative segregation as a protection for [petitioner's] own safety." *Id.* Even after petitioner expressly told local officials that he perceived no threat to his safety, they still kept him confined. CA App. 73-74. The Bureau later conceded, in response to petitioner's administrative claim, that his safety was not in fact threatened at all: "a further review of intelligence information again revealed no threat." CA App. 68. And, contrary to respondent Quinlan's answers to Congressional inquiries, respondent Miller has "vigorously challenge[d]" that concern for petitioner's safety "caused him to be slapped into detention." *Id.* at 84. Indeed, Miller viewed petitioner's supposed security concern as "hogwash." *Id.* at 85.

Similar discrepancies mar respondents' purported justifications for petitioner's extended second detention, *viz.*, alleged violation of prison telephone rules. Respondent Quinlan initially represented to the Associate Attorney General that petitioner's plan to call reporters was "irrelevant" to his confinement. *Id.* at 96. In response to subsequent inquiries from the United States Senate, respondent Quinlan stated that petitioner was confined because he made a "third-party" call (a call to one party who forwards it electronically to a third party). *Id.* at 78. Respondent Quinlan repeated this explanation in response to an inquiry from the House of Representatives. *Id.* at 108.

The Bureau eventually admitted that petitioner was detained and isolated this second time before the election to prevent him from calling the group of reporters. *Id.* at 68-69. In its letter denying petitioner's administrative tort claim, the Bureau stated:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in Washington, D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention, to avoid a violation of our rules and protect the integrity of institutional security.

Id. Respondent Miller also acknowledged this as the true reason for the confinement: "The Bureau of Prisons caught on that he was going to hold another press conference, . . . so they put him back in." *Id.* at 90, 172. Miller further stated: "It was certainly my understanding at the time that it was this attempt to hold an unauthorized press conference which directly caused him to be segregated once again." *Id.* at 86.

Petitioner also pointed out in the district court that, contrary to respondents' contentions, Bureau regulations do not prohibit inmates from telephoning a group of reporters. Bureau officials, have acknowledged that "inmates certainly are allowed contact with the media, either through written correspondence or by telephone" and that "[a]n inmate can make telephone calls to media representatives." *Id.* at 148, 153.

Bureau regulations cast further doubt on respondents' explanation for the confinement. Those regulations do not permit segregation as a sanction for making a "third-party" call. 28 C.F.R. § 541.13 (1994); Pet. App. 55a. Moreover, the regulations require a prior hearing and finding of guilt before an inmate may be locked into isolation, unless the inmate poses a substantial security risk to the prison pending such a review. 28 C.F.R. § 541.22(a).[8]

3. The district court denied respondents' motion for qualified immunity. Pet. App. 44a-63a. First, the court held that it was clearly established prior to November 1988 that "federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." *Id.* at 47a. The district court then turned to the sufficiency of petitioner's allegations when assessed under the "heightened pleading standard" articulated by the District of Columbia Circuit in *Siegert v. Gilley*. In *Siegert*, the court of appeals ruled that in *Bivens* and § 1983 cases in which motive is an element of the alleged offense, plaintiffs must present "direct evidence" of intent. In the district court's view, the decision in *Siegert* left some ambiguity as to whether

---

[8] As the district court explained: "An inmate may be placed in administrative detention pending investigation of alleged violation of prison regulations only 'when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution.' 28 C.F.R. § 541.22(a). Kimberlin apparently was not at any pertinent time period regarded as a serious threat in any of these respects." Pet. App. 55a n.14.

"direct" meant the exclusion of conclusory allegations or of all circumstantial evidence. The district court reasoned that *Siegert* did not depart from this Court's precedent establishing that direct evidence is no better, and is often less reliable, than circumstantial evidence. *Id.* at 52a. The court also noted the inherent impracticality of producing "direct evidence" of intent in any circumstances, let alone prior to discovery, and held: "it is unlikely that the Court of Appeals meant in *Siegert* to exclude from consideration any and all circumstantial evidence as that term is understood in the law of evidence irrespective of its specificity and concreteness." *Id.* at 52a n.9. Accordingly, the court concluded that *Siegert* requires a plaintiff to proffer "something other than mere conclusions, namely tangible allegations of concrete facts corroborative of his own subjective version of the events." *Id.* at 52a-53a.

In applying this standard to the record in this case, the district court held that petitioner's claims satisfied the heightened pleading standard set forth in *Siegert* and warranted denial of a motion to dismiss the complaint. The court scrutinized the allegations and evidence surrounding each of petitioner's periods of administrative isolation, including evidence contradicting respondents' explanations for their conduct. That analysis led the court to hold that petitioner's allegations are "sufficiently tangible, detailed, and nonconclusory" to survive summary disposition. *Id.* at 56a.

4. On respondents' interlocutory appeal, a divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed and dismissed petitioner's *Bivens* claim. The panel

produced three separate opinions. The majority opinion written by Judge Henderson held that the "heightened pleading standard" enunciated in *Siegert* precludes reliance on circumstantial evidence alone; rather, it requires *Bivens* and § 1983 plaintiffs to produce, prior to discovery, "direct evidence" of unconstitutional motive. *Id.* at 12a-13a. Focusing solely on the absence of "direct evidence" of intent, the majority concluded that this action must be dismissed at the outset. In the court's view, petitioner's pre-discovery submissions constituted "mere" circumstantial or inferential evidence of respondents' unlawful efforts to silence him. *Id.*

Concurring separately, Judge Williams expressly criticized the "direct evidence" pleading rule imposed by circuit precedent. Among the numerous shortcomings he noted were: (1) the rule "appears completely arbitrary and unrelated to the strength of the plaintiff's case;" and (2) "the requirement would be fatal except in the rare case of the defendant's confession." *Id.* at 18a. For these reasons, Judge Williams found it "hardly surprising that the only circuits to consider [the District of Columbia Circuit's] direct evidence rule have rejected it." *Id.*

Judge Edwards dissented. In his view, the heightened pleading standard applied in this case is incorrect at two levels of analysis. First, he questioned whether the Federal Rules of Civil Procedure permit the judicial creation of heightened pleading standards in any type of case. *Id.* at 20a. Judge Edwards explained that this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), "casts doubt on the validity of ***any*** judge-made 'heightened

pleading' standard imposed in ***any*** context." Pet. App. 20a.

The second rationale for Judge Edwards' dissent was his conclusion that, even if a "heightened pleading" standard were permissible, the requirement of "direct evidence" of intent has "no foundation in reason or in the case law." *Id.* at 21a. He explained that "if one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence -- albeit wholly circumstantial -- that it snowed while one was asleep." *Id.* at 39a. Conversely, "direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him." *Id.*

In this case, Judge Edwards found that petitioner had presented "powerful circumstantial evidence" that "overwhelmingly supports an inference that the defendants acted with unconstitutional motive." *Id.* at 28a, 39a. If the allegations and evidence in this case do not suffice even to obtain discovery, then the standard has been tilted too heavily against individuals seeking redress for violation of clearly established constitutional rights and will "prevent a plaintiff from overcoming the qualified immunity defense except in the most extraordinary circumstances." *Id.* at 41a.

The petition for rehearing en banc was denied, although more active members of the court favored rehearing than opposed it. *See* Pet. 10 & n.8; Pet. App. 69a. Six members of the court, including three who concurred in the denial of en banc review, voiced their disagreement with the circuit's direct

evidence rule. Judge Silberman, for example, in concurring in the denial of rehearing en banc, acknowledged that "[t]hose who criticize this circuit's direct versus circumstantial evidence distinction . . . have a logical point . . . ." Pet. App. 67a (citation omitted). Similarly, Judge Williams, joined by Judges Buckley and Silberman, acknowledged that "[t]he imperfections of our 'direct evidence' rule are plain to see." *Id.* at 65a.

In dissent, Judge Edwards, joined by Chief Judge Mikva and Judge Wald, described the circuit's pleading standard as supported by "neither logic nor law" (*id.* at 72a) and as "Kafkaesque" because it requires more at the pleading stage than is necessary to prevail at trial. *Id.* at 69a.

SUMMARY OF ARGUMENT

1. The decision below employed a standard that serves none of the purposes this Court's qualified immunity jurisprudence requires. This Court has repeatedly instructed that a delicate balance must be struck between the rights of victimized citizens to seek redress for constitutional wrongs and the need to protect government officials engaged in lawful discretionary acts from insubstantial lawsuits.

In contrast to the discerning analysis this Court has prescribed, the decision below employed a "direct evidence" standard that neither addresses nor satisfies the requisite balance. Under the decision below, meritorious complaints supported by powerful circumstantial evidence of defendant's unlawful intent will be dismissed (without even an opportunity for limited or "tailored" discovery)

solely because they lack "direct" evidence of state of mind. For a plaintiff with a substantial claim that his constitutional rights have been violated, that standard provides insufficient protection. Conversely, the "direct evidence" rule may also provide insufficient protection to a federal official who faces a claim brought by a plaintiff with extremely weak, but "direct," evidence of intent.

2. The "direct evidence" rule promotes incorrect results because it focuses on the wrong question, namely, the form of the evidence rather than its substance. Direct evidence is often no more reliable than circumstantial evidence. For that reason, circumstantial evidence has long been accepted as sufficient to prove claims in virtually every area of law. And, the one issue for which circumstantial evidence is most ideally suited is state of mind. It would, therefore, impose a Sisyphean burden on plaintiffs in *Bivens* actions to require "direct" evidence of intent while precluding all discovery.

These basic flaws in the "direct evidence" rule have resulted in its universal rejection by every other court of appeals that has considered it. In addition, five Justices of this Court have written disapprovingly of the standard applied in this case.

3. The "direct evidence" rule is not only incorrect, it is also unwarranted. The courts of appeals that have rejected the "direct evidence" standard have demonstrated they are well capable of resolving claims of qualified immunity in a manner conforming to this Court's instructions. Most telling, it has been the consistent position of the United States for more than five years that the "direct evidence" rule fashioned by the District of Columbia

Circuit is incorrect. In briefs filed in this Court, the two most recent Administrations have urged a different standard. As the branch of government most directly affected by the test for assessing qualified immunity claims in *Bivens* cases, this criticism is a powerful reminder that the functions of government do not require the "direct evidence" rule.

4. The "direct evidence" rule has no pedigree in the Federal Rules of Civil Procedure. Whether viewed as a heightened standard for pleading (Rules 8, 9) or a heightened standard for summary judgment (Rule 56), the Federal Rules leave no room for exceptions to be created in particular types of cases. This Court so held in *Leatherman* and that holding is fully applicable here.

5. As reflected in the experience of every other court of appeals and the urging of the United States, an appropriate balance can be struck to accommodate the conflicting concerns present in *Bivens* cases. The record in this case leaves no doubt -- and the Department of Justice so acknowledged in the court below -- that under any valid standard, petitioner's detailed, specific, nonconclusory allegations and evidence were more than ample to survive motions to dismiss or for summary judgment. The decision of the court of appeals is incorrect and should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED BY REQUIRING *BIVENS* PLAINTIFFS TO SUBMIT "DIRECT" EVIDENCE OF INTENT

A. The Decision Below Is Contrary To This Court's Perceived Need To Strike A Satisfactory Balance That Protects Both Citizens And Officials

The admittedly unprecedented actions by federal officials that silenced and punished petitioner's exercise of his clearly established First Amendment rights provides the backdrop for this Court to resolve the tension between two imperatives: preserving a remedy for victims of constitutional violations to seek redress and to deter future violations, and protecting government officials from frivolous lawsuits so they may perform their functions without undue concern over potential litigation. This tension would not exist if no government official ever abused his position by violating clearly established constitutional standards, and no plaintiff ever filed an unmeritorious lawsuit. Because reality falls short of that utopian ideal, the courts face the task of charting an acceptable course that permits constitutional violations to be remedied without unduly interfering in the lawful functions of government. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("Our cases have accommodated these conflicting concerns . . . ."); *Harlow*, 457 U.S. at 807 ("qualified immunity defense . . . reflect[s] an

attempt to balance competing values . . . ."); *Butz v. Economou*, 438 U.S. 478, 508-12 (1978).

The charting of that course requires acute sensitivity to valid concerns on both sides of the equation. A standard that too easily immunizes government officials will shield misconduct from meritorious claims. A standard that too easily dispenses with immunity will expose officials to the burdens of litigation and potential liability for frivolous claims.

Few violations strike more directly at the heart of our constitutional system than infringement of the free speech protections of the First Amendment. As this Court has recognized, there exists "a broad consensus" that restraints "imposed upon criticism of government and public officials, [are] inconsistent with the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).[9] That is because the

---

[9] In the quoted portion of *New York Times Co. v. Sullivan*, the Court was commenting on the Sedition Act of 1798, ch. 73, 1 Stat. 596, "which first crystallized a national awareness of the central meaning of the First Amendment." 376 U.S. at 273. That statute was enacted with an expiration date shortly after the elections of 1800. It was used to prosecute critics of Federalist officials, including, for example, James Callender's calling President Adams a "hoary headed incendiary" and a "man whose hands are reeking with the blood of the poor, friendless Connecticut sailor," and Luther Baldwin's conviction "because he expressed a wish that a cannon shot had lodged in the president's posterior." James M. Smith, *Freedom's Fetters* 270, 340 (1956). *See* John C. Miller, *Crisis in Freedom* 107 (1951) (Congressman Matthew Lyon prosecuted for publishing a letter from a person in France that "urged Congress to commit President Adams to the madhouse"); *see also* Smith, *supra* at 211-20 (Callender); Thomas I. Emerson et al., *Political and Civil Rights in the United States* 35-38 (1967).

First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *Id.* at 270 (quoting Judge Learned Hand's opinion in *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). Accordingly, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Consistent with that principle, this Court has observed that "'[j]ust as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.'" *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)); *see also Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

Beyond the constitutional imperative of the First Amendment, solicitude for the rights of individuals subject to governmental overreaching is particularly urgent in the federal prison context, where, as the government has advised this Court, "[t]he comprehensive control exercised by prison staff over the inmate population . . . carries with it the risk that staff members may at times abuse their authority and violate inmates' constitutional rights." Government Amicus Brief on Cert. Petition at 3 ("Gov't Pet. Am."). For these and other victims of constitutional abuses it is often "damages or nothing." *Bivens*, 403 U.S. at 410. *See Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the

only realistic avenue for vindication of constitutional guarantees.").

Given these necessary constitutional concerns, the court below employed a standard that tilts the balance too heavily in favor of protecting official misconduct from judicial scrutiny. Under the court of appeals' standard, a claim of qualified immunity would shield even the most pernicious cabal to silence political critics or to deprive citizens of constitutional freedoms in the absence of "direct evidence." Indeed, the court below would immunize the members of that hypothetical cabal from submitting to discovery even in the face of overwhelming circumstantial evidence of wrongdoing and wrongful intent.

In place of the "direct evidence" standard employed below, other courts of appeals, this Court, and the Executive Branch in the two most recent administrations have employed a balance that more faithfully accommodates both sides of the qualified immunity equation. Under a more balanced and discerning standard, it is clear that the dismissal of petitioner's *Bivens* action should be reversed.

B. This Court's Discerning Approach To Qualified Immunity Requires Reversal

This Court's decision in *Bivens* is rooted in the reality that victims of constitutional wrongs are often powerless and remediless. 403 U.S. at 410. At the same time, *Bivens* did not strip federal officials of their historic immunity from suit. That immunity is qualified, not absolute. As the Court has made clear: "For executive officials in general . . . our cases make plain that qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. *See Mitchell v. Forsyth*, 472

U.S. 511 (1985); *Butz*, 438 U.S. 478. In establishing qualified immunity, the Court relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." *Butz*, 438 U.S. at 507.

In *Harlow*, the Court addressed the ramifications for qualified immunity in cases where the parties disputed the official's knowledge of the relevant constitutional standard and, hence, his intent to violate the standard. The Court concluded that factual inquiry into the defendant's subjective knowledge of constitutional norms was not warranted. An objective test -- whether the constitutional standard was clearly established -- more properly accommodated the plaintiff's constitutional protections with the official's entitlement to immunity for lawful conduct. Under the objective test articulated in *Harlow*, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. In an effort to weed out "insubstantial" cases prior to discovery and trial, the Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Following *Harlow*, litigation in *Bivens* and § 1983 cases has been structured to address two fundamental questions: (1) did the challenged conduct violate a clearly established right; and (2) did the official engage in the challenged conduct. On the first question, *Harlow* precluded factual inquiry into

subjective intent. But, that is not so with respect to the second question, as the government has advised the Court in this case: "[n]either *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified-immunity defense is raised." Gov't Pet. Am. 12 n.9.

Two years after the decision in *Harlow*, the United States Court of Appeals for the District of Columbia Circuit considered the question not addressed in *Harlow*. In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court first established the notion of a heightened pleading standard and held that, in cases in which the motive of government officials is an element of the claim, a plaintiff must assert nonconclusory allegations that support a claim of unconstitutional motive. *See id.* at 29. The court held that "[t]he allegations on this issue need not be extensive," but "they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response . . . ." *Id.* Nothing in *Hobson* suggested a need for direct evidence.

The "direct evidence" requirement first surfaced in a subsequent case, in which the District of Columbia Circuit ruled that a plaintiff was entitled to limited discovery in order to obtain the necessary evidence to defeat a motion for summary judgment: "more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated . . . ." *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1435 (D.C. Cir. 1987). The court specifically recognized that

the availability of a remedy in these cases would be "an empty gesture were we to impose a blanket restriction on ***all*** discovery prior to the resolution of the qualified immunity issue on summary judgment," because, if that were so, unlawful schemes would be uncovered "only in the unlikely event that a [defendant] volunteered the information, or the equally unlikely happenstance that an eavesdropper heard and reported what the [defendants] said." *Id.* at 1437 & n.24.

In subsequent cases, the court extended that ruling to bar discovery altogether. In *Whitacre v. Davey*, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1938 (1990), the court "made clear that if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." In *Siegert v. Gilley*, the court reiterated this expanded version of its heightened pleading rule yet again and concluded:

> [U]nder this court's heightened pleading standard, in order to obtain even limited discovery, [unconstitutional] intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

895 F.2d at 802. Thus, in six years the court's "heightened pleading" rule had evolved from the relatively benign rule of *Hobson* to a draconian proscription of all discovery in the absence of "direct evidence" of intent. *See* Pet. App. 29a-38a.

No matter how powerful the circumstantial evidence plaintiff submits, the claim will be

dismissed unless, without the aid of discovery, plaintiff presents "direct" evidence. That standard is contrary to both goals underlying qualified immunity. It neither weeds out insubstantial lawsuits nor protects legitimate actions against premature dismissal.

C. The "Direct Evidence" Standard Is Contrary To Settled Principles

By requiring constitutional plaintiffs to proffer "direct evidence" of intent, the court of appeals has established a litmus test that has nothing to do with the merits of a case or the validity of a qualified immunity defense. Most fundamentally, the standard crafted by the court below is contrary to this Court's longstanding recognition that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). In some instances, circumstantial evidence "may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). For at least 170 years, it has been the rule that circumstantial evidence may be just as probative as direct or testimonial evidence:

> [W]e are not to shut our eyes on circumstances which sometimes carry with them a conviction which the most positive testimony will sometimes fail to produce.

The Robert Edwards, 19 U.S. (6 Wheat.) 187, 190 (1821).

Requiring "direct evidence" is particularly inappropriate where, as here, defendant's state of mind is at issue. "An opposing party's state of mind is, by its nature, difficult to prove, and is most often proved by circumstantial evidence." Gov't Pet. Am. 14-15. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *United States Postal Service Board v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."). For that reason, this Court has endorsed the sufficiency of circumstantial evidence to prove intent in a wide variety of cases. As this Court noted in cases of fraud:

> [P]roof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.

Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 n.30 (1983). Consistent with this view, Fed. R. Civ. P. 9(b) imposes a ***lesser*** pleading standard for allegations pertaining to state of mind: "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

It has also long been accepted that intent is generally and necessarily proved with circumstantial evidence:

> [T]he state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries every day pass upon knowledge, belief and intent -- the state of men's minds -- having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.

American Communications Ass'n v. Douds, 339 U.S. 382, 411 (1950).

Circumstantial evidence is entirely adequate to prevail at trial in civil rights actions. *See, e.g., Village of Arlington Heights*, 429 U.S. at 266 (circumstantial evidence is adequate to prove discriminatory intent); *Farmer v. Brennan*, 114 S. Ct. 1970, 1981 (1994) (Eighth Amendment case where Court held that proof of the requisite knowledge of prison officials was "subject to demonstration in the usual ways, including inference from circumstantial evidence"); *United States Postal Service Board*, 460 U.S. at 714 n.3 (unlawful intent in Title VII action, "[a]s in any lawsuit" is proved with either direct or circumstantial evidence); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (Title VII race discrimination case provable

with circumstantial evidence); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("discriminatory intent need not be proved by direct evidence"); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (circumstantial evidence of racial bias is sufficient to show Equal Protection violation in jury selection). *Cf. NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963)(circumstantial evidence is adequate in cases of employment discrimination against union); *see also Ferrer v. Zayas*, 914 F.2d 309, 312 (1st Cir. 1990) ("Direct as opposed to circumstantial proof of discrimination is not required . . . .").

In certain other areas of law, such as antitrust enforcement, "circumstantial evidence is [its] lifeblood." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973); *see also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). In other contexts, circumstantial evidence is recognized as the only way for the plaintiff to prove his or her case. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993) (Free Exercise clause case seeking to determine the motives of the community in barring killing of animals); *Michalic*, 364 U.S. at 330 (Jones Act); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 & n.17 (1957) (Federal Employers' Liability Act).

Indeed, circumstantial evidence of intent is sufficient to convict a criminal defendant beyond a reasonable doubt. *See, e.g., Cox v. Louisiana*, 379 U.S. 559, 567 (1965) ("Louisiana surely has the right to infer the appropriate intent from circumstantial evidence."); *Holland*, 348 U.S. 121 (conviction affirmed in criminal tax evasion case where government's evidence was circumstantial); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187 (conviction

affirmed under Collection Law). It should be more than adequate to survive a summary judgment motion in a civil *Bivens* case prior to discovery.

D. The Direct Evidence Standard Has Been Universally Rejected In *Bivens* Cases

The direct evidence standard has evolved in the District of Columbia Circuit into an insuperable obstacle to discovery in meritorious cases with strong circumstantial evidence. That result is so far afield from settled principles that it has been universally rejected elsewhere. Although this Court's decision in *Siegert* did not reach the merits of the District of Columbia Circuit's direct evidence pleading rule, the four Justices who addressed the rule flatly disapproved it. Justice Kennedy's concurring opinion states that: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the [District of Columbia Circuit] Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." 500 U.S. at 236 (Kennedy, J., concurring). Justice Marshall, in a dissenting opinion joined by Justice Stevens and Justice Blackmun, perceived that the direct evidence rule "effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim" and that there is "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 246 (Marshall, J., dissenting).

In a more recent concurring opinion, Justice Kennedy, joined by Justice Scalia, recognized that

circumstantial evidence may overcome a claim of qualified immunity:

> [T]he question [of qualified immunity] may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case.

Wyatt v. Cole, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring).

In addition, all courts of appeals to consider the "direct evidence" rule have rejected it. The Seventh Circuit held: "[a]lthough the court of appeals' opinion in *Siegert* insisted that the plaintiff produce 'direct' evidence of the defendant's improper intent, we agree with Justice Kennedy['s concurring opinion in *Siegert*] that there is no principled difference between direct and circumstantial evidence." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) (citation omitted), *cert. denied*, 502 U.S. 1121 (1992). The unanimous panel observed: "Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Id.*

The Ninth Circuit has also expressly rejected the standard employed below: "We disagree . . . with the District of Columbia that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial, evidence." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), *appeal after remand*, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994). The Sixth Circuit rejected a direct

evidence rule in *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989), holding that a plaintiff may rely on proof "that would be strong enough to allow a jury to return a verdict for her under appropriate instructions" and "it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof." Most recently, the Fifth Circuit rejected the direct evidence rule in *Tompkins v. Vickers*, 26 F.3d 603, 609 (5th Cir. 1994): "We agree with those Circuits that have rejected the argument that a plaintiff must produce direct evidence in a case such as this. Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent. . . . [R]equiring direct evidence would effectively insulate from suit public officials who deny an improper motive . . . ." Accordingly, "[t]he District of Columbia Circuit alone requires that a plaintiff plead and present direct as opposed to circumstantial evidence in these cases." Gov't Pet. Am. 13-14 (footnote omitted).

E. The "Direct Evidence" Rule Strikes An Incorrect Balance And Is Counterproductive To Its Stated Purpose

The universal criticism of the direct evidence rule stems not only from its unwarranted derogation of circumstantial evidence, but also from the rule's failure to advance its stated purpose of immunizing officials from frivolous cases. Instead of striking a balance that sifts the meritorious from the frivolous, the direct evidence rule disposes of cases on the wholly arbitrary basis of the ***type*** of evidence submitted. The form of evidence governs, not its substance. Thus, a weak, baseless case with

conclusory -- but direct -- evidence of intent will go forward. A strong case with substantial supporting evidence will be dismissed absent "direct" evidence of intent (without even affording the plaintiff an opportunity for discovery that might unearth elusive "direct" evidence of facts peculiarly within the control of defendant).

Perhaps no criticism of the direct evidence rule is more compelling than the disapproval of the Executive branch. *Bivens* cases challenge conduct by federal officials; accordingly, the United States has a direct institutional stake in the standards for pleading and proof and "an interest in protecting government employees from meritless and unduly burdensome litigation . . . ." Gov't Pet. Am. 1-2. Yet the two most recent Administrations have criticized the direct evidence rule and urged this Court to reject it. In its brief in *Siegert*, five years ago, the United States argued that

> [A]s this Court has recognized, "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), and we do not think the court of appeals' opinion [in *Siegert*], which focused primarily on the conclusory nature of petitioner's assertions, must be read to conflict with that holding.

CA App. 138.

And in its amicus brief supporting certiorari in this case, the United States stated that "the requirement of direct (as opposed to circumstantial)

evidence in this context is incorrect . . . ." Gov't Pet. Am. 14. In short, the party with the greatest institutional interest and the most extensive experience litigating *Bivens* cases attests to the error and lack of necessity or support for the standard employed below.

F. The Court Of Appeals Erred By Fashioning A "Heightened Pleading" Standard Contrary To The Federal Rules of Civil Procedure

A further infirmity in the decision below is the erection of a "heightened pleading" standard that is contrary to the Federal Rules of Civil Procedure and this Court's decision in *Leatherman v. Tarrant County*, 113 S. Ct. 1160. In *Leatherman*, a civil rights action against a municipality, this Court unanimously held that heightened pleading standards are "impossible to square" with the "liberal system of 'notice pleading' set up by [Fed. R. Civ. P. 8(a)]." 113 S. Ct. at 1163.[10] The holding in *Leatherman* rests on the plain language of the Federal Rules, which does not create distinctions based on the subject matter of the case or the identity of the defendant.

The same Federal Rules that governed municipal liability in *Leatherman* apply with equal force to *Bivens* cases, and the court of appeals' heightened

---

[10] The heightened pleading standard struck down in *Leatherman* was similar to the one established by the District of Columbia Circuit in *Hobson v. Wilson*. The *Leatherman* standard required "'that the plaintiff's complaints state with factual detail and particularity the basis for the claim.'" 113 S. Ct. at 1163 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

pleading standard necessarily diverges from those rules. With reference to precisely the same District of Columbia Circuit pleading rule in *Siegert*, Justice Kennedy perceived that: "The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b)." 500 U.S. at 236 (Kennedy, J., concurring).[11]

---

[11] Several courts of appeals and numerous district courts have concluded that the rationale of *Leatherman* precludes a heightened pleading standard in *Bivens* and § 1983 actions against individual government officials. *See. Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir. 1994); *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994); *Tuite v. Henry*, No. 93 C 3248, 1994 U.S. Dist. LEXIS 1845, at **8-9 (N.D. Ill. Feb. 11, 1994) ("Just as the Federal Rules do not create an exception from Rule 8 for allegations of municipal civil rights liability, it seems consistent to conclude that they do not create such an exception for suits against individual government officials."); *McCallen v. Holland-Hull*, No. 93-3415, 1994 U.S. Dist. LEXIS 1364, at *3 (E.D. Pa. Jan. 27, 1994) ("[T]he Court's analysis [in *Leatherman*], one of basic statutory construction, applies with equal force in § 1983 cases against individual defendants."); *Batiste v. Colonial Sugars, Inc.*, No. 92-3513, 1993 U.S. Dist. LEXIS 6038, at *5 (E.D. La. May 5, 1993) ("There is no logical reason to limit *Leatherman's* holding to claims of municipal liability, as the same Federal Rules of Civil Procedure govern all claims arising under § 1983."); *Dodson v. City of Kenner*, No. 92-3530:E/6, 1993 U.S. Dist. LEXIS 6077, at *2 (E.D. La. May 5, 1993) ("Just as Chief Justice Rehnquist noted that Rule 9(b) makes no mention of municipal liability, this Court notes that the rule fails to mention claims against individual government officials."); *Mohid v. Wheatley*, No. 3:92-CV-2284-H, 1993 U.S. Dist. LEXIS 5285, at *8 (N.D. Tex. Apr. 20, 1993) ("Although the Supreme Court expressly refused to consider cases such as this one involving liability of an individual government official, its reasoning extends to the circumstances of this case . . . ." (citation omitted)); *Callaghan v. Congemi*, No. 91-1496, 1993 U.S. Dist. LEXIS 4819, at *17 (E.D. La. Apr. 8, 1993) ("The Supreme Court's reasoning in *Leatherman* . . . appears to sound the death knell for [the] requirement of heightened pleading in suits involving

When qualified immunity issues arise in *Bivens* and § 1983 cases involving intent, it is not uncommon that motions to dismiss and motions for summary judgment are conflated. It is equally at odds with the Federal Rules for a heightened pleading or "heightened production" requirement (*see* Pet. App. 9a n.8) to be imposed at summary judgment. Rule 56 creates no exception for *Bivens* cases, or civil rights cases generally. As Justice Kennedy explained in *Siegert*, the circuit's rule "departs also from the normal standard for summary judgment under Rule 56." 500 U.S. at 235 (Kennedy, J., concurring). For the same reasons set forth in *Leatherman*, there is no warrant for any such exception to Rule 56 to be judicially inferred.

Accordingly, in ruling on a motion to dismiss, all allegations of the complaint must be deemed to be true. *Leatherman*, 113 S. Ct. at 1161. In ruling on a motion for summary judgment, all inferences must be drawn and all doubts resolved in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A "firm application of the Federal Rules of Civil Procedure" (*Harlow*, 457 U.S. at 819 n.35; *Butz*, 438 U.S. at 508), provides ample latitude for resolving claims of qualified immunity. In addition to Rules 12 and 56, district courts may employ Rules 16, 26(b) and (c), and 37 to tailor a discovery program that will enable the immunity question to be litigated with

---

individual government officials." (citation omitted)); *Sapp v. Cunningham*, 847 F. Supp. 893, 900 n.9 (D. Wyo. 1994) ("*Leatherman* effectively overrules this aspect of *Sawyer v. County of Creek*, 908 F.2d 663, 665-67 (10th Cir. 1990), where the Tenth Circuit endorsed a heightened pleading requirement.")

minimal burden on the defendant. Further safeguards against frivolous claims exist in Rule 11 and 28 U.S.C. § 1915(d). *See, e.g., Jackson v. Carpenter*, 921 F.2d 68, 69 (5th Cir. 1991); *In re Tyler*, 839 F.2d 1290, 1293 (8th Cir. 1988); *Dowell v. Tennessee*, No. 92-6125, 1993 U.S. App. LEXIS 11715, at *2 (6th Cir. May 18, 1993); *Franklin v. Murphy*, 745 F.2d 1221, 1227-29 (9th Cir. 1984); *Denny v. Hinton*, 131 F.R.D. 659, 667 (M.D.N.C. 1990), *aff'd mem. sub nom. Denny v. Elliott*, 937 F.2d 602 (4th Cir. 1991); *Elmore v. McCammon*, 640 F. Supp. 905, 910-12 (S.D. Tex. 1986). In short, there is no occasion to engraft exceptions and qualifications onto existing federal rules to achieve the fair and efficient adjudication of qualified immunity claims.

G. This Court Should Articulate A Standard That More Appropriately Balances the Competing Objectives

The Court need not proscribe all "heightened" standards to dispose of this case. Consistent with the views of the Executive branch, other courts of appeals have fashioned standards for pleading and summary judgment that more fairly and effectively weed out insubstantial lawsuits while permitting meritorious claims to proceed. Those courts have fashioned a threshold standard utilizing the formulation set forth in Justice Kennedy's concurring opinion in *Siegert*: to sustain a *Bivens* or § 1983 claim at the pleading stage a plaintiff must support allegations of wrongful intent with "specific, nonconclusory factual

allegations." 500 U.S. at 236 (Kennedy, J., concurring).[12]

Courts of appeals that have adopted this standard have employed it effectively to dispose of insubstantial lawsuits alleging improper motive. *See, e.g., Wicks v. Mississippi State Employment Servs.*, 41 F.3d at 996 (plaintiff failed to allege "particular facts showing behavior by [defendant was] motivated by racial animus"; "broad and wholly conclusionary allegations" are not sufficient); *Maxey v. Murray*, No. 93-17346, 1994 U.S. App. LEXIS 25262, at ** 4-5 (9th Cir. Sept. 7, 1994) (plaintiff alleging excessive force "has submitted no evidence that any force used against him was applied maliciously or sadistically for the purpose of causing harm"); *Branch v. Tunnell*, 937 F.2d at 1388 (plaintiff alleging that the defendant knowingly included false statements in a warrant affidavit, "ma[de] no effort to identify which allegations in [defendant's] lengthy warrant affidavit he challenges as untrue"); *Walker v. Trammel*, No. 92-2763, 1993 U.S. App. LEXIS 22909, at *8 (7th Cir. Aug. 30, 1993) (plaintiff alleging arbitrary confinement in disciplinary segregation did not submit any evidence contradicting defendant's sworn

---

12 *See Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 996, 995 (5th Cir. 1995) (internal quotations omitted) (prior to discovery, plaintiff must "state with factual detail and particularity the basis for the claim," which, "if proven, would demonstrate that [plaintiff] violated clearly established statutory or constitutional rights"); *Branch v. Tunnell*, 937 F.2d at 1386 (prior to discovery, plaintiffs must "state in their complaint nonconclusory allegations setting forth evidence of unlawful intent"); *Elliott v. Thomas*, 937 F.2d at 344-45 (prior to discovery, plaintiff must produce "'specific, nonconclusory factual allegations which establish [the necessary mental state]'")(alteration in original).

affidavit providing justification for his actions); *Wright v. Jefferson County Police Department*, No. 92-6203, 1993 U.S. App. LEXIS 32556, at *10 (6th Cir. Dec. 8, 1993) ("[P]laintiff's sole allegation with regard to unconstitutional motive is that the police impounded his car because plaintiff's friend, starting 'running his mouth.'"); *Elliott v. Thomas*, 937 F.2d at 346 (plaintiff alleging that defendants sought to punish her on account of her speech offered "no reason other than her own suspicions to doubt the administrators' account of their reasons").

Where plaintiffs have produced "specific, nonconclusory factual allegations," the courts exercise their traditional authority under Fed. R. Civ. P. 56. Summary judgment may either be denied or the court may permit discovery tailored to assist further scrutiny of the qualified immunity defense where the plaintiff demonstrates a "plausible basis for a belief that discoverable materials exist that would likely suffice to raise a genuine issue of material fact . . . ." *Resolution Trust Corp. v. North Bridge Associates*, 22 F.3d 1198, 1206 (1st Cir. 1994). This Court's decisions clearly contemplate such permissible discovery. In *Anderson v. Creighton*, 483 U.S. at 646 n.6, the Court anticipated that "discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved" and may be "tailored specifically to the question of [defendant's] qualified immunity." In its recent brief opposing certiorari in *Branch v. Tunnell*, the government commented that where the court permitted limited discovery before resolving the qualified immunity defense, it had followed "precisely the manner this Court specified in *Anderson v. Creighton*." Br. in Opp., No. 93-1327, at 8-9. This procedure fully protects defendants and

provides an additional safeguard against insubstantial lawsuits: no claim will proceed to discovery and trial unless at least three federal judges agree that it should (the district judge who denies summary judgment, and the majority of the court of appeals that affirms).

Under this "specific, nonconclusory" standard, petitioner plainly presented ample evidence to overcome respondents' motions. After reviewing the record, the district court held that petitioner's submission was "sufficiently tangible, detailed, and nonconclusory" to proceed. Pet. App. 56a. Indeed, the Department of Justice conceded in the court of appeals that under this standard "we agree that summary judgment was properly denied." Reply Br. for Appellants (D.C. Cir. No. 91-5315), at 2. As the district court held, the Department of Justice acknowledges, and the record fully warrants, under any standard other than the "direct evidence" rule, petitioner's *Bivens* claim should survive summary judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT
Counsel of Record
ELLEN S. WINTER
KATHLEEN M. GRABER
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

March 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRETT C. KIMBERLIN Federal Correctional Institute Memphis, TN 38134, Plaintiff, v. J. MICHAEL QUINLAN, Individually and as Director of the Bureau of Prisons, UNITED STATES BUREAU OF PRISONS, 320 First Street, N.W. Washington, D.C. 20534, LOYE W. MILLER, JR., Individually, 1672 - D Beekman Place, N.W. Washington, D.C. 20009 UNITED STATES OF AMERICA, Defendants.	JURY TRIAL DEMANDED Civil Action No. 90-1549 HHG

FIRST AMENDED COMPLAINT FOR DAMAGES FOR VIOLATIONS OF CONSTITUTIONAL AND STATUTORY RIGHTS

Plaintiff Brett C. Kimberlin, by his undersigned attorneys, alleges upon knowledge with respect to himself and his own actions, and upon information and belief as to other matters, as follows:

1. This is an action seeking, *inter alia*, compensatory and punitive damages, from defendants J. Michael Quinlan, individually, and Loye Miller, individually, who, acting under color of federal law, violated plaintiff Kimberlin's constitutional rights, as guaranteed by the First and Fifth Amendments of the United States Constitution. This action further seeks statutory damages from defendants the United States Bureau of Prisons and J. Michael Quinlan, as Director of the Bureau of Prisons, arising from violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq*. Finally, this action seeks compensatory damages from defendant United States under the Federal Tort Claims Act.

JURISDICTION

2. This action is brought pursuant to the Constitution of the United States; 18 U.S.C. § 2520; 28 U.S.C. § 1331; 28 U.S.C. § 1346; and 28 U.S.C. § 2671.

VENUE

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (e) and 1402(b).

PARTIES

4. Plaintiff Brett C. Kimberlin is a prisoner currently incarcerated at the federal correctional institute ("FCI") in Memphis, Tennessee. At the time that the events described herein took place, plaintiff was incarcerated in the FCI in El Reno, Oklahoma. Kimberlin is a resident of Tennessee.

5. Defendant J. Michael Quinlan is the Director of the Federal Bureau of Prisons, located in Washington, D.C. He served in that capacity as well at all times relevant to this Complaint. In his capacity as Director of the Bureau of Prisons, Quinlan is responsible for the management and functioning of the Bureau of Prisons and the federal prison system.

6. Defendant Loye W. Miller, Jr. was the Director of Public Affairs at the Department of Justice at all times relevant to this Complaint. Miller is no longer employed by the Department of Justice. He resides in Washington, D.C.

7. Defendants Quinlan and Miller (hereinafter sometimes referred to as the "individual defendants") acted by agreement in conspiracy and in concert with each other and other federal officials, under color of federal law.

FACTS COMMON TO ALL COUNTS

8. Shortly before the 1988 presidential election, and continuing thereafter, each of the defendants participated in and furthered a scheme to deprive Kimberlin of his First Amendment right to speak with the press and his Fifth Amendment right to due process. Pursuant to this scheme, the individual defendants herein ordered or intentionally caused and facilitated Kimberlin to be placed repeatedly into detention for the purpose of stifling his attempts to communicate with the press about a matter of public interest and for the purpose of retaliating against Kimberlin for such attempts.

9. In furtherance of this scheme, certain defendants have violated Kimberlin's statutory right to unmonitored telephone calls and have repeatedly subjected Kimberlin to tortious assault, battery and false imprisonment.

THE FIRST DETENTION, ON NOVEMBER 4, 1988

10. Dan Quayle, Senator from Indiana, was the vice-presidential candidate on the ticket with George Bush in the 1988 presidential election. Shortly prior to November 4, 1988, a small number of news reporters initiated contacts with Kimberlin after learning that Kimberlin believed, and had stated, that he had sold marijuana on several occasions in 1972 to Dan Quayle.

11. As the weekend before the 1988 presidential election approached, various news media representatives appeared to gain interest in publishing Kimberlin's statements. On or

about Friday, November 4, 1988, a camera crew from NBC National News arrived at the El Reno FCI to conduct an interview with Kimberlin. This interview had been approved by El Reno FCI officials.

12. Miller did not learn of this interview until after it had occurred. (Exhibit C, p. 1). Although Quinlan has recently stated that he "personally facilitated" the NBC interview (Exhibit D), he implied otherwise in an earlier letter responding to inquiries from Senator Joseph Biden:

> The procedure for media interviews of this type is to arrange a mutually agreeable time and date which will not disrupt institutional security or incur additional staffing costs; *the policy leaves the decision of when to schedule timely interviews to the discretion of local officials*.

(Exhibit 1 to Exhibit A) (emphasis added).

13. Although not able to speak with Kimberlin, the local newspaper, the *El Reno Tribune*, published a story that day reporting, for the first time in any publication, the existence of Kimberlin's claims and the fact that NBC National News had conducted an interview of him. On or around that afternoon of November 4, 1988, numerous news organizations around the country learned of Kimberlin's claims and that NBC National News had conducted the interview.

14. On that afternoon of November 4, 1988, the El Reno FCI was deluged with requests to interview Kimberlin. Roger Benefiel, the Executive Assistant to the El Reno FCI Warden, scheduled a group interview for 7:00 that evening at which any interested member of the press would be permitted to speak with Kimberlin. Benefiel scheduled this group interview for the purpose of accommodating the news reporters' requests in a way that would be efficient and convenient for the local prison officials. Several news reporters were admitted into the El Reno FCI to participate in the interview.

15. Defendants Miller and Quinlan learned of this scheduled group interview after the local officials had approved it, but before it was to take place. The individual defendants viewed the potential occurrence of such an interview as unacceptable because such a news conference would make possible wide publication of Kimberlin's statements. Accordingly, Quinlan ordered the interview cancelled.

16. Kimberlin's potential contacts with the press were of great concern to defendants, since these officials had a stake in the success of the Bush-Quayle campaign. If the campaign were not successful, the individual defendants would have lost their powerful, prestigious and financially lucrative positions. Defendants' fears were reinforced by the expressed concern of members of Senator Quayle's campaign staff. Mark Goodin, the Deputy Press Secretary to the Quayle campaign, for example, closely monitored Kimberlin's activities and briefed top officials of the campaign on several occasions. The Quayle campaign was sufficiently concerned that Goodin planned to travel with Quayle on the day before the election to handle media inquiries in the event that the press published Kimberlin's claims. (Exhibit C, p. 4). Miller was in continuous contact with the Bush-Quayle campaign and with the BOP regarding Kimberlin, and defendants Miller and Quinlan were well aware of the campaign's concern. (Exhibit 2 to Exhibit A).

17. Although Miller initially denied discussing the attempted news conference with other Justice Department officials, he later conceded in response to questioning that he had discussed the matter with Robin Ross, the Executive Assistant to the Attorney General. (Exhibit 2 to Exhibit A; Exhibit C, p. 6).

18. Quinlan cancelled the scheduled group interview even though the local prison officials had determined that such a news conference was advisable and permissible, and even though the Associate Attorney General, Francis Keating II, one of Quinlan's superiors, had previously advised Quinlan that reporters should have access to Kimberlin. (Exhibit 2 to Exhibit A).

19. Pursuant to Quinlan's order, Benefiel announced to the news reporters who had gathered that the interview had been cancelled. In accordance with Quinlan's order, Benefiel falsely represented to the news reporters that the news conference had been cancelled due to "unforeseen developments." Benefiel informed the reporters that they could interview Kimberlin at a "later time" if they wished to do so. Despite this assurance, no such interviews were permitted prior to the election.

20. Responding to inquiries from Senator Joseph Biden, Quinlan falsely asserted that press conferences were contrary to the "Bureau's policy on media access." (Exhibit 1 to Exhibit A). The former General Counsel for BOP, in contrast, confirmed that inmate press conferences are not contrary to BOP policy and that they have been held in the past. (Exhibit 2 to Exhibit A).

21. The cancellation of the interview substantially heightened the press' interest in Kimberlin's claims. Defendants Quinlan and Miller determined that, because Kimberlin would continue to have access to telephonic communications with some of the interested news reporters, cancelling the news conference was insufficient to prevent further information concerning Kimberlin's allegations from reaching the press and being published. As a result of this concern, defendants Miller and Quinlan, acting under color of law in their official capacities, conspired to place Kimberlin into detention to prevent him from contacting media representatives. Once placed in detention, a prisoner is segregated from the general prison population and, as described below, is deprived of most inmate privileges. The detention cells are also used as disciplinary segregation cells for prisoners found guilty of prison rules.

22. Pursuant to defendants' scheme, on the evening of November 4, 1988, defendant Quinlan, with the aid and cooperation of defendant Miller and other officials of the Department of Justice, personally ordered that Kimberlin be placed into detention. (Exhibit B, p. 2). Defendants took this action for the specific purpose of wrongfully prohibiting him from freely exercising his constitutional First Amendment

right to speak with members of the press, and to retaliate against him for such attempts.

23. Pursuant to Quinlan's directive, approximately six guards arrived at Kimberlin's cell, forcibly pulled him from his cell, handcuffed his hands behind his back and marched him off to the detention unit. Kimberlin's arms were raised high behind his back, in a painful position, forcing him to slouch over as the guards led him to detention. Kimberlin was marched across the prison compound in frigid temperature, and was not given a coat to wear, though the guards each wore one. When Kimberlin arrived at the detention unit, he was strip-searched. This treatment was designed to retaliate against Kimberlin for exercising his First Amendment rights and to intimidate him from speaking with the press in the future.

24. No pre-detention hearing was held to determine whether Kimberlin should be placed into detention, and despite Kimberlin's repeated inquiries, no justification was given to him prior to his seizure as to the basis for this action. The guards' only response to Kimberlin's entreaties for an explanation was "you are going to the hole."

25. In a calculated effort to conceal their true motivations for causing Kimberlin to be placed into detention, defendants Quinlan and Miller knowingly concocted a false pretense to justify placing Kimberlin into detention. Quinlan and Miller falsely represented to the media and other federal officials that Kimberlin's safety was threatened and that this threat justified placing him into detention. In truth, neither Quinlan nor Miller believed that Kimberlin's safety in fact was threatened.

26. In furtherance of this effort to conceal defendants' true motivations for silencing Kimberlin, and to provide a false pretense to segregate him, defendant Miller contacted J.D. Williams, the South Central Regional Director of the Bureau of Prisons, on November 4, 1988, after the press conference had been cancelled. Miller falsely told Williams that a news reporter told Miller that Kimberlin feared for his safety from other inmates. This discussion occurred well after normal working hours. (Exhibit 4 to Exhibit A; Exhibit

B, p. 3). Miller's false statements regarding Kimberlin's safety formed the justification to place Kimberlin into detention. (Exhibit B, p. 3). Miller, however, did not believe that Kimberlin's safety was actually threatened. (Exhibit C, p. 4).

27. This communication between Miller and an employee of the Bureau of Prisons unconnected with public relations was unusual, if not improper, wholly apart from the falsity of Miller's statements. In response to an administrative claim filed by Kimberlin under the Federal Tort Claims Act (Exhibit A), the Bureau of Prisons asserted that Miller made these statements to the Bureau's public relations staff and that it was Quinlan who spoke with the Regional Director (Exhibit B, p. 3). Contemporaneous documentation, however, reveals that Miller contacted Williams directly. (Exhibit 4 to Exhibit A).

28. Although Miller claimed to BOP officials that a reporter told him that Kimberlin feared for his safety, the reporter has stated that it is "absolutely, categorically untrue" that she ever made such a comment to Miller. (Exhibit E). According to the reporter, "it was very clear to me they were looking for an excuse" to prevent Kimberlin from talking to reporters. (*Id.*)

29. As a further act to conceal the wrongful deprivation of Kimberlin's constitutional and personal rights, Quinlan knowingly misrepresented to Senator Biden that Kimberlin was placed into detention on November 4 for his protection (Exhibit 1 to Exhibit A).

30. Quinlan's personal involvement in ordering an inmate into detention was highly unusual and possibly unprecedented. Such determinations are generally made by local officials who are best able to determine whether detention is warranted, and are particularly better suited to determine whether an inmate's safety is threatened. John Pendleton, Congressional Liaison for the BOP, has stated that he cannot recall another instance in which the director made the decision to place an inmate into detention, and that "[i]t's usually handled at the warden level." (Exhibit 2 to Exhibit A).

31. Upon learning of the purported justification for his placement into detention, Kimberlin denied that he perceived any threat to his safety. Nonetheless, Kimberlin was placed in a detention cell.

32. Despite defendants' claims that Kimberlin was segregated for his protection, a written order governing the terms of his detention provided that he was not allowed to make telephone calls. This order was in violation of regulations promulgated by the Bureau of Prisons, 28 C.F.R. § 540.105 (1988), and was issued in furtherance of defendants' scheme to deprive Kimberlin of his First Amendment rights.

33. Defendants ultimately caused the local prison officials to demand that Kimberlin telephone a particular news reporter, because the reporter threatened Miller that she would publish Kimberlin's statements unless permitted to speak with him. Quinlan misleadingly portrayed this action to Senator Biden as indicating that Kimberlin was granted free access to the press. (Exhibit 1 to Exhibit A). Kimberlin was not authorized to make other telephone calls while segregated from the general prison population, even though the purported basis for defendants' actions was to protect him.

34. The BOP has now acknowledged that Kimberlin's safety was not threatened. (Exhibit B, p. 3).

THE SECOND DETENTION, ON NOVEMBER 7, 1988

35. On the evening of November 5, 1988, Kimberlin was temporarily released from detention after a reporter threatened Miller that she would broadcast Kimberlin's statements unless he were released.

36. Following his release, members of the press continued their attempts to contact Kimberlin regarding his claims about the vice-presidential candidate. Bureau of Prisons officials learned, through the systematic monitoring of plaintiff's telephone communications, that Kimberlin

intended to discuss his allegations regarding Senator Quayle with reporters over the telephone on the morning of November 7. (Exhibit B, pp. 3-4). A group of reporters planned to receive Kimberlin's telephone call in a hotel in Washington, D.C..

37. Because Kimberlin was planning to speak with members of the press over the telephone, he was again placed into segregation in the early morning of November 7, 1988, the day before the presidential election. In furtherance of defendants' scheme to silence Kimberlin in violation of his First Amendment rights and to prevent him from speaking with the press, El Reno FCI guards arrived again at Kimberlin's cell, seized him and hauled him into detention.

38. Quinlan admitted that he was kept informed of this action. (Exhibit 2 to Exhibit A). Miller is reported in the press to have stated that Quinlan ordered this second detention. According to the *New York Times*, "[Miller] said Mr. Kimberlin was *twice* placed in administrative detention *on the order of J. Michael Quinlan*, head of the Federal Bureau of Prisons." (Exhibit F) (emphasis added).

39. The guards provided no prior justification to Kimberlin for this action. The report filed on the date of this second detention provides only that Kimberlin was segregated because of an unspecified "investigation." Kimberlin was not provided prior notice of the charges against him, an opportunity to rebut those charges, or informed of the nature of the supposed "investigation" prior to being placed into detention.

40. In its response to Kimberlin's Federal Tort Claims Act administrative claim, the Bureau of Prisons acknowledges that Kimberlin was placed into detention on November 7 to prevent him from speaking with the reporters who gathered at the Washington, D.C. hotel. The letter from Carolyn Sabol, BOP Regional Counsel, confirms:

> On Monday, November 7, 1988, upon review of intelligence information, it was determined that Mr. Kimberlin was attempting to use the telephone to set up a press conference in

> Washington, D.C. that morning. As a result, Mr. Kimberlin was again placed in administrative detention, to avoid a violation of our rules and protect the integrity of institutional security.

(Exhibit B, pp. 3-4).

41. Nothing in the Bureau of Prisons regulations prohibits an inmate from speaking to a group of news reporters over the telephone. Such a regulation, if it did exist, would violate the First Amendment.

42. In an effort to conceal defendants' true motivations for placing Kimberlin into detention -- which the Bureau of Prisons now concedes was to prevent contact with the press -- prison officials invented a pretense for this second such action. In furtherance of defendants' scheme, these officials knowingly created a report that falsely stated that Kimberlin was being placed into detention because he made a "third-party call," that is, a call to one party who transfers it to a third. The purported violation does not carry detention as a permissible sanction.

43. In a further effort to conceal defendants' true motivation of secluding Kimberlin from the press, Quinlan falsely reported to Senator Biden that Kimberlin was placed into detention this second time because he allegedly made a third-party call, not because, as the Bureau of Prisons now concedes, he was attempting to speak with the press. Quinlan falsely wrote Senator Biden:

> [Kimberlin] was returned to administrative detention for disciplinary reasons. During this intervening period he had full access to the inmate telephone system and had the opportunity to contact the media if he desired. On Monday, however, Mr. Kimberlin had attempted to place a telephone call via a third party call forwarding system, in direct violation of inmate telephone regulations.

(Exhibit 1 to Exhibit A).

44. While Quinlan was claiming that Kimberlin was placed into detention this second time because he made a "third-party" call, Miller knew the true, and now admitted, reason: "The Bureau of Prisons caught on that he was going to hold another press conference, so they put him back in." (Exhibit 2 to Exhibit A).

45. While voters cast their ballots on November 8, 1988, Kimberlin languished in detention. Kimberlin was not released from detention until after the presidential election was completed, on November 14, 1988, when a local disciplinary hearing officer determined that the violation with which he was charged -- making a third-party call -- does not carry the sanction of disciplinary segregation.

46. For several weeks after Kimberlin was released from detention on November 14, 1988, he was not permitted to return to the preferred housing in which he previously was housed. Instead, he was placed in the "Oklahoma unit", which essentially is a warehouse of unusually cramped and exceptionally noisy cages in which the lights remain on at all times.

THE THIRD DETENTION, ON DECEMBER 22, 1988, AND CONTINUAL HARASSMENT

47. After Kimberlin was released from segregation on November 14, 1988, defendants caused prison officials at the El Reno FCI to conduct a campaign to demoralize and terrify Kimberlin. In furtherance of and to facilitate defendants' scheme to deprive Kimberlin of his First Amendment rights, Kimberlin was subjected to continuous harassment by prison officials at El Reno. These officials also threatened Kimberlin that they could return him to detention at a moment's notice.

48. In furtherance of defendants' scheme to prevent Kimberlin from exercising constitutional rights, and as a result of the campaign against Kimberlin which defendants caused to be set in motion, Kimberlin was again placed into

detention on or about December 22, 1988. Kimberlin again was forcibly seized and handcuffed, although he offered no resistance, and was taken to the detention cells.

49. Again, Kimberlin did not receive a predetention hearing or an opportunity to rebut the charges against him in connection with this third placement into detention.

50. Prison officials again attempted to justify this third placement with an allegation that Kimberlin had made another "third-party call", even though Bureau of Prisons regulations provide, and the disciplinary hearing officer had determined in connection with the previous such charge, that detention is not an authorized sanction for placing a third-party call. This asserted justification was false; the true reason for this action was to retaliate against Kimberlin for making claims regarding Senator Quayle and to prevent him from making such claims in the future.

51. On or about December 23, 1988, Kimberlin was released from detention, but he nonetheless lost his preferred housing privileges. The official who released him remarked that he might get into trouble for doing so, but that there was no justification for Kimberlin's continued detention. In January 1989, well after his release from detention, Kimberlin was found not guilty of misusing the telephone.

52. Through the course of and after the presidential election, defendants caused the systematic monitoring of Kimberlin's telephone calls for the improper purposes of controlling the content of his statements to members of the press and to provide Bush-Quayle campaign officials with information regarding the level of the press' interest in Kimberlin's statements.

53. Upon becoming aware of Kimberlin's statements and his contacts with interested news reporters, various officials of the Bureau of Prisons and Department of Justice caused a special investigative lieutenant to investigate and monitor Kimberlin's telephone calls using the prison's electronic telephone monitoring system. Not only were Kimberlin's

calls monitored as they were made, but this investigating official also began to listen to earlier recorded conversations.

54. Miller was kept informed of these officials' actions, and has acknowledged: "The fact is that, by that stage of the game, the prison authorities were monitoring all of Kimberlin's prodigious telephone traffic." (Exhibit C, p. 4).

55. Prison officials also monitored Kimberlin's privileged calls to his attorneys. Prison officials used one such call to his attorneys to place Kimberlin into detention on December 21, 1988.

56. The conditions of Kimberlin's confinements while in detention were egregious. On all three occasions, whether the purported justification for the segregation was to protect his safety or to investigate a violation of prison rules, Kimberlin was kept in the same types of cells and under the same conditions as inmates receiving punishment for violations of prison rules. Each time, Kimberlin was kept in a roach-infested, 4' x 6' cell for 24 hours each day, while permitted only brief exercise periods.

57. During his first detention on November 4, 1988, Kimberlin was placed into a tiny cell with an inmate in apparent need of medical care. During his second detention on November 7, 1988, Kimberlin was placed into a tiny cell with a seemingly suicidal inmate. During his third detention, Kimberlin was placed with an inmate who continually uttered bizarre and aggressive statements and who exhibited sexually deviant behavior. On each occasion, there were empty cells in the detention section in which Kimberlin could have been placed.

58. Each time Kimberlin was placed into detention, he was denied a substantial number of privileges available to the general inmate population, including access to the library, school, recreation, commissary, daily showers and other inmates. On some occasions, he was not permitted to call loved ones to inform them of his mistreatment. As a result of his detentions, Kimberlin missed time from his job and missed classes he was attending in pursuit of his college

degree. Also, Kimberlin lost personal property as a result of his detention.

59. As a result of being disciplined without justification, being muzzled in connection with his attempts to exercise basic First Amendment rights, and being subjected to harassment and unusual surveillance, Kimberlin also suffered humiliation, anxiety, fear and emotional distress.

60. By letter dated August 1, 1990, Representative Robert W. Kastenmeier, on behalf of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the United States House of Representatives, has requested Quinlan to provide a "full explanation" of the circumstances of Kimberlin's confinements. (Exhibit G).

COUNT I

(FIRST AMENDMENT *BIVENS* CLAIMS AGAINST RESPONDENTS QUINLAN, INDIVIDUALLY, AND MILLER, INDIVIDUALLY)

61. Plaintiff repeats and incorporates by reference the allegations of paragraphs 1-60 as if fully set forth herein.

62. By causing Kimberlin to be placed into detention in order to prevent him from making his claims regarding Senator Quayle, and to retaliate against him as a result of those claims, the individual defendants, while acting under color of federal law, intentionally and wantonly violated plaintiff's right of freedom of speech guaranteed by the First Amendment of the Constitution of the United States.

63. By causing the continual harassment of Kimberlin, by stepping up surveillance of his activities, and by subjecting him to threats as a result of his statements regarding Senator Quayle, the individual defendants violated Kimberlin's First Amendment rights.

COUNT II

(FIFTH AMENDMENT *BIVENS* CLAIMS AGAINST RESPONDENTS QUINLAN, INDIVIDUALLY, AND MILLER, INDIVIDUALLY)

64. Plaintiff repeats and incorporates by reference the allegations of paragraphs 1-63 as if fully set forth herein.

65. The individual defendants while acting under color of federal law conspired to, and did, cause plaintiff Kimberlin to be intentionally and wrongfully placed into detention on two separate occasions in November 1988 and on one occasion in December 1988 without basis and for an improper and impermissible purpose. Such conduct on the part of the individual defendants intentionally and wantonly violated plaintiff's right to due process pursuant to the Fifth Amendment of the Constitution of the United States.

66. In addition, by causing Kimberlin to be placed into detention without affording him notice of the charges against him, and an opportunity to rebut those charges, defendants caused Kimberlin to be deprived of procedural due process rights guaranteed by the Fifth Amendment of the United States Constitution.

67. With respect to the November 4 detention described above, no predetention hearing was held to determine whether Kimberlin should be placed into detention, and despite his repeated inquiries, Kimberlin received no justification prior to being booked as to the basis for this action.

68. Similarly, with respect to the detentions commencing on November 7, 1988, and on December 21, 1988, Kimberlin was provided no predetention hearing, no opportunity to rebut the charges against him and no notice of the basis for being placed into detention prior to such action.

COUNT III

(FEDERAL TORT CLAIMS ACT CLAIMS FOR ASSAULT, BATTERY AND FALSE IMPRISONMENT AGAINST THE UNITED STATES OF AMERICA)

69. Plaintiff repeats and incorporates by reference the allegations of paragraphs 1-68 as if fully set forth herein.

70. On or about December 14, 1989, plaintiff filed with the Bureau of Prisons an administrative claim pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, seeking compensatory damages for tortious false imprisonment, assault and battery, resulting from his improper placements into detention. (Exhibit A). By letter dated June 19, 1990, Carolyn Sabol, Regional Counsel for the Bureau of Prisons, denied the claim in all respects. (Exhibit B). Six months has passed since plaintiff filed his administrative complaint. Consequently, plaintiff has exhausted his administrative remedies.

71. Kimberlin's placements into the segregation cells on November 4, 1988, November 7, 1988 and December 21, 1988, constituted in each instance the tort of false imprisonment committed and supervised by law enforcement officers of the United States Government, while acting within the scope of their employment. These law enforcement officers intended unlawfully to confine Kimberlin in administrative detention; and in fact did so confine him, resulting in substantial harm to Kimberlin.

72. Each time the El Reno FCI guards, supervised by Quinlan and other law enforcement officers of the United States, unlawfully seized Kimberlin and forced him to the segregation cells, those United States officials committed the torts of assault and battery against Kimberlin. Kimberlin was continuously subject to apprehension of imminent battery as a result of defendants' scheme to silence him and was subject to battery each time he was forcibly placed into detention. The actions of these guards resulted in substantial harm to Kimberlin.

COUNT IV

(CLAIMS FOR VIOLATION OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. § 2511, AGAINST RESPONDENTS QUINLAN, AS DIRECTOR OF THE BUREAU OF PRISONS, AND BUREAU OF PRISONS)

73. Plaintiff repeats and incorporates by reference the allegations of paragraphs 1-72 as if fully set forth herein.

74. By causing the interception, monitoring and use of Kimberlin's private telephonic communications, defendants Quinlan and the United States Bureau of Prisons have repeatedly violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511.

75. The interception, monitoring and use of Kimberlin's telephone calls described herein were done without his consent, express or implied, and for the sole purposes of facilitating and furthering defendants' scheme to silence, isolate and retaliate against Kimberlin as a result of his statements concerning the vice-presidential candidate. In addition, such monitoring was done for the improper purpose of supplying information to Bush-Quayle campaign officials regarding Kimberlin's statements and the level of media interest in such statements.

76. In addition, the conduct described herein constitutes violations of Bureau of Prisons regulations. Those regulations limit the permissible monitoring of prison inmate telephone calls to the extent necessary to "preserve the security and orderly management of the institution and to protect the public." 28 C.F.R. § 540.101.

77. Furthermore, the calls that were intercepted, monitored and used included privileged attorney-client communications with Kimberlin's attorneys. With respect to these calls, defendants have violated both the Omnibus Crime Control and Safe Streets Act of 1968 and Bureau of Prison regulation 28 C.F.R. § 540.101, which prohibits monitoring an inmate's call to his attorney.

WHEREFORE, plaintiff demands judgment:

1. Against the individual defendants on the First and Second Counts for compensatory damages and punitive damages in an amount to be determined at trial;

2. Against defendant United States of America on the Third Count for compensatory damages in an amount to be determined at trial;

3. Against defendants Quinlan, as the Director of the Bureau of Prisons, and the United States Bureau of Prisons on the Fourth Count for statutory damages as provided by 18 U.S.C. § 2520(2)(B) in an amount to be determined at trial;

4. Against all defendants for the costs, disbursements and attorneys' fees for this action;

5. For any further and different relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands trial by jury of all issues triable by jury.

Dated: August 15, 1990 Respectfully submitted,

/s/

Howard T. Rosenblatt
D.C. Bar No. 415605
Robert C. Threlkeld
D.C. Bar No. 416563

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Plaintiff
Brett C. Kimberlin

No. 93-2068

Supreme Court, U.S.
FILED
MAR 27 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
WILLIAM J. DEMPSTER
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity?

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct" as opposed to persuasive circumstantial, evidence of unlawful motive?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. THE APPLICATION OF AN OBJECTIVE QUALIFIED IMMUNITY TEST IN UNCONSTITUTIONAL MOTIVE CASES HAS IMPELLED THE CREATION OF A HEIGHTENED PLEADING STANDARD	15
II. THE DIRECT EVIDENCE STANDARD IS IMPELLED BY THE COURT'S DECISION IN HARLOW	21
III. IF THE COURT REJECTS THE DIRECT EVIDENCE STANDARD, IT SHOULD NEVERTHELESS APPLY A MEANINGFUL HEIGHTENED STANDARD THAT REALISTICALLY PRESERVES QUALIFIED IMMUNITY IN MOTIVE-BASED *BIVENS* SUITS	26
IV. REGARDLESS OF WHICH APPROACH THE COURT ADOPTS, RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY	32
CONCLUSION	35

TABLE OF AUTHORITIES

Cases	Page
Alaska Airlines, Inc. v. *Johnson*, 8 F.3d 791 (Fed. Cir. 1993)	31
Anderson v. *Creighton*, 483 U.S. 635 (1987)	16, 17, 18, 27
Anderson v. *Liberty Lobby*, 477 U.S. 242 (1986)	30
Arkansas Electric Coopertative Corp. v. *Arkansas Pub. Serv. Comm'n.*, 461 U.S. 375 (1983)	24
Bell v. *Wolfish*, 441 U.S. 520 (1976)	33
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	*passim*
Black v. *Lane*, 22 F.3d 1395 (7th Cir. 1994)	28
Bowsher v. *Merck & Co., Inc.*, 460 U.S. 824 (1983)	24
Branch v. *Tunnell*, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994)	28
Butz v. *Economou*, 438 U.S. 478 (1978)	14, 16
Cruzan v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990)	31, 32
Davis v. *Passman*, 442 U.S. 228 (1979)	24
Davis v. *Scherer*, 468 U.S. 183 (1984)	17, 25
Elliott v. *Thomas*, 937 F.2d 338 (7th Cir. 1991)	20, 28
First National Bank v. *Cities Service Co.*, 391 U.S. 253 (1968)	22
Gregoire v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)	16
Grogan v. *Garner*, 498 U.S. 279 (1991)	32
Halperin v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986)	18
Hansen v. *Soldenwagner*, 19 F.3d 573 (11th Cir. 1994)	19
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	*passim*
Hewitt v. *Helms*, 459 U.S. 460 (1983)	33
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)	20, 21
Holland v. *United States*, 348 U.S. 121 (1954)	25
Hunter v. *Bryant*, 502 U.S. 224 (1991)	16
Kartseva v. *Department of State*, 37 F.3d 1524 (D.C. Cir. 1994)	20, 28

TABLE OF AUTHORITIES—Continued

	Page
Kenyatta v. *Moore*, 744 F.2d 1179 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985)	18
Kimberlin v. *DeLong*, 637 N.E.2d 121 (Ind. 1994)	2
Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993)	26, 27, 28
Malley v. *Briggs*, 475 U.S. 335 (1986)	30, 33
Martin v. *D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir. 1986)	18, 19, 20, 22
Masson v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)	32
Matsushita Electric Industrial Co., Ltd. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	22
Mitchell v. *Forsyth*, 472 U.S. 511 (1985)	16, 17
Pell v. *Procunier*, 417 U.S. 817 (1973)	5, 33, 34
Pueblo Neighborhood Health Ctrs., Inc. v. *Losavio*, 847 F.2d 642 (10th Cir. 1988)	20
Quill Corporation v. *North Dakota*, 112 S.Ct. 1904 (1992)	24
Saxbe v. *Washington Post Co.*, 417 U.S. 843 (1973)	5, 33
Scheuer v. *Rhodes*, 416 U.S. 232 (1974)	17, 25, 26
Schultea v. *Wood*, 1995 WL 98234 (5th Cir. March 9, 1995)	28
Siegert v. *Gilley*, 500 U.S. 226 (1991)	16, 17, 29
Siegert v. *Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991)	20, 32
Smith v. *Nixon*, 807 F.2d 197 (D.C. Cir. 1986)	18, 26
Tenney v. *Brandhove*, 341 U.S. 367 (1951)	14
Torncello v. *United States*, 681 F.2d 756 (Ct. Cl. 1982)	31
United States v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926)	31
United States v. *Kimberlin*, 483 F. Supp. 350 (S.D. Ind. 1979)	2
United States v. *Kimberlin*, 781 F.2d 1247 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986)	2
United States v. *Kimberlin*, 805 F.2d 210 (7th Cir.), *cert. denied*, 483 U.S. 1023 (1987)	2

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Morgan*, 313 U.S. 409 (1941)	32
Washington v. *District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986)	14
Weeks v. *Quinlan*, 838 F.2d 41 (2d Cir. 1988)	4
Weiler v. *United States*, 323 U.S. 606 (1945)	22, 23
Whitacre v. *Davey*, 890 F.2d 1168 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990)	19
Wood v. *Strickland*, 420 U.S. 308 (1975)	17
Woodby v. *INS*, 385 U.S. 276 (1966)	31
Wyatt v. *Cole*, 112 S.Ct. 1827 (1992)	16, 29
Statutes	
18 U.S.C. § 2511	9
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2072(b)	28
28 U.S.C. § 2671, *et seq.*	9
42 U.S.C. § 1983	16, 27
Regulations	
28 C.F.R. §§ 540.61-540.63	4
28 C.F.R. § 540.61(g)	4
28 C.F.R. § 540.64	4
28 C.F.R. § 540.104	8
28 C.F.R. § 541.22	5
28 C.F.R. § 541.22(a)	6
28 C.F.R. § 541.23(a)(8)	6
Other Authorities	
Fed. R. Civ. P. 7	28
Fed. R. Civ. P. 8	27, 28
Fed. R. Civ. P. 9(b)	28
Fed. R. Civ. P. 12	27
Fed. R. Civ. P. 56	27
Fed. R. Civ. P. 56(e)	27
Fed. R. Evid. 407	23
Fed. R. Evid. 408	23
Fed. R. Evid. 409	23
1 McCormick on Evidence, (4th ed. 1992)	23
60A Am. Jur. 2d *Perjury* §§ 96-97	22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,

Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The order and opinions denying petitioner's suggestion for rehearing and for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. Pet. App. 79a. A petition for rehearing was denied on April 1, 1994 (Pet. App. 64a-75a). The petition for a writ of certiorari was filed on June 22, 1994 and granted on January 20, 1995. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

STATEMENT

1. Petitioner Brett C. Kimberlin is a former federal inmate who at the time of the events at issue in this case was serving a 51-year sentence for various explosives violations, including malicious use of explosives to injure a person, conspiracy to smuggle marijuana, impersonating a federal officer and the illegal use of the Presidential seal and Department of Defense insignia. C.A. App. 93; Pet. App. 3a & n.3, 44a & n.1. He is also a convicted perjurer. C.A. App. 93.[1] In this *Bivens*[2] action Kimberlin seeks damages from respondents, J. Michael Quinlan, the former Director of the Bureau of Prisons ("Bureau"), and Loye W. Miller, Jr., the former Director of Public Affairs for the United States Department of Justice. He alleges, *inter alia*, that Quinlan and Miller conspired to violate his First Amendment rights when they allegedly caused him to be placed in administrative detention because of the content of his speech.

In late 1988, while imprisoned at the Federal Correctional Institution at El Reno, Oklahoma, petitioner stated that he "believed" he had sold marijuana to Dan Quayle on several occasions in 1972. C.A. App. 12; App. A3. When petitioner made that allegation, Quayle was a United States Senator and a candidate for Vice-President of the United States. Approximately two weeks prior to the November 8, 1988 presidential election, petitioner provided Nina Totenberg, a correspondent for National Public Radio, with both a taped telephone interview and a written affidavit containing his allegations about having

---

[1] *See e.g., United States* v. *Kimberlin*, 805 F.2d 210, 215-16 (7th Cir.), *cert. denied*, 483 U.S. 1023 (1987); *United States* v. *Kimberlin*, 781 F.2d 1247, 1248-49 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986); *United States* v. *Kimberlin*, 483 F. Supp. 350, 351 (S.D. Ind. 1979); *Kimberlin* v. *DeLong*, 637 N.E.2d 121, 123-24 (Ind. 1994).

[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

sold marijuana to Quayle. Totenberg did not report the story because she could not corroborate it. C.A. App. 79.

Petitioner, who was in active telephone contact with several national news reporters, C.A. App. 92, then offered the story to NBC News, which requested permission from El Reno officials to interview and videotape petitioner one week prior to the election. Although the NBC request was made too late under normal El Reno logistical procedures to allow the interview to be conducted prior to the election, Quinlan, at NBC's behest, personally intervened and directed El Reno to accommodate NBC and permit the interview. C.A. App. 92; Pet. App. 3a. As a result, NBC videotaped a lengthy interview of Kimberlin four days before the election, that it decided not to air. C.A. App. 67, 92, 94, 106-07.[3]

The NBC videotaping generated other press interest in the petitioner and resulted in other news organizations seeking immediate access to him. C.A. App. 67. To accommodate the numerous press inquiries, the El Reno acting-warden scheduled a "press conference" for petitioner at 7:00 p.m. *the same evening*. Pet. App. 4a. Upon learning from a reporter of the scheduled press conference, Mark Goodin, Deputy Press Secretary for the Bush/Quayle campaign, telephoned Miller and stated he was "amazed" that the petitioner was going to hold a press conference. Pet. App. 4a. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.* Totenberg also telephoned Miller and expressed unhappiness about the press conference, indicating that she had given up her chance to report petitioner's claims exclusively, and that with a press conference, another news organization was not likely to be so responsible. C.A. App. 82. Miller told her he would check into it. *Id.*

---

[3] The record is in conflict as to whether the NBC interview lasted forty-five minutes or four hours. Compare C.A. App. 49 with C.A. App. 67, 106.

Sometime that afternoon, the Bureau's Central Office in Washington learned from a wire service inquiry that petitioner was scheduled to hold a "press conference" at the El Reno institution. Because the Bureau's regulations do not permit inmate press conferences, and because he had never permitted them during his tenure as Director, Quinlan ordered the institution to cancel the press conference pursuant to his authority as Director. Pet. App. 4a & n.6; C.A. App. 67, 78, 95.[4] Although Bureau regulations permit individual media contacts by inmates, and small press pools in some circumstances, neither the regulations nor Bureau policy permit inmate "press conferences." C.A. App. 95; Pet. App. 4a & n.6. The regulations also provide that any questions as to their meaning or application "are resolved by the Director of the Bureau of Prisons." 28 C.F.R. § 540.61(g) (1988).[5]

---

[4] Historically, the position of Director of the Bureau of Prisons always has been held by a career Bureau professional. In late 1988, Quinlan was a 17-year career civil servant who had risen through the Bureau's ranks and had served as a warden. *See e.g.*, *Weeks* v. *Quinlan*, 838 F.2d 41, 42 (2d Cir. 1988). He therefore possessed not only the regulatory authority, as Director, to cancel the press conference, he also had far more familiarity and experience with Bureau policy and procedures than did the then-acting warden at El Reno. Petitioner's effort to undermine Quinlan by citing to a December 19, 1988 *Legal Times* article in which it was reported that the Bureau's General Counsel allegedly said press conferences had been permitted in the past is wide of the mark. The article is inaccurate and inadmissible hearsay.

[5] *See* 28 C.F.R. §§ 540.61-540.63 (1988) (permitting limited media interviews of inmates); 28 C.F.R. § 540.64 (1988) (permitting small press "pools" with one press member from each major press medium). Petitioner seeks to avoid the fact that "press conferences" are not permitted, and never have been, by using the more soothing term "group interview"—which also is not permitted—to characterize his event. Pet. Br. 10. The prohibition is based on the need to maintain inmate discipline. This Court has recognized that when, as here, the press concentrates its attention on a particular inmate, that interest often leads to the inmate becoming a "public figure" within the prison population and fre-

a. *The November 4 Detention.* That evening, petitioner telephoned Totenberg, "complained bitterly" about the cancellation of his press conference and expressed concern "about what the Justice Department might do to him." C.A. App. 80, 83-84. Totenberg then called Miller who recalls that she said petitioner believed that his "safety was threatened by the hostile attitude of the prison authorities." *Id.* at 84. Subsequently, Miller telephoned his press counterpart at the Bureau and informed him of the Totenberg call, including that petitioner believed "he was in danger." Pet. App. 5a; 53a.

That information was conveyed to Director Quinlan, C.A. App. 95, who gave instructions, not to El Reno authorities, but to J.D. Williams, the Regional Director with oversight of El Reno, "to take appropriate steps to ensure the inmate's safety and to investigate the purported danger." C.A. App. 68. Williams conveyed the information to the acting-warden at El Reno. *Id.* As Quinlan later wrote, "it was clearly understood that this information would result in Kimberlin being placed in administrative detention (a non-punitive, single cell status) pending an assessment of any possible threat to Kimberlin." C.A. App. 95, 107; Pet. App. 5a.[6] At approximately 11:30 p.m. on the evening of Friday, November 4, 1988, petitioner was placed in administrative detention for the purpose of investigating reported threats to his safety. His time in detention totalled approximately twenty hours. Pet. App. 5a; C.A. App. 95; 28 C.F.R. § 541.22.

---

quently a disciplinary problem "that can engulf a large portion of the population of a prison." *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 848-49 (1973); *Pell* v. *Procunier*, 417 U.S. 817, 831-32 (1973). Restrictions such as the prohibition of inmate "press conferences" or "group interviews" are appropriate because the press has no "constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

[6] Applicable regulations provide that BOP officials may place an inmate in administrative detention "when the inmate's continued

Upon hearing from other inmates that petitioner had been placed in non-punitive detention based on a fear that he was in danger, Totenberg telephoned Miller. C.A. App. 80. When she learned during that conversation that she was being quoted as the source for saying petitioner was in danger, Totenberg told Miller it was "untrue" and denied having said "any such thing." *Id.* Nevertheless, Totenberg subsequently admitted that petitioner had expressed concern to her "about what the Justice Department might do to him." *Id.* In addition, Mark Goodin testified that on that same evening Totenberg told him during a telephone conversation that the petitioner "fear[ed] for his safety." C.A. App. 114.

The contemporaneous detention order prepared by the executive assistant to the El Reno acting-warden, indicated that the petitioner was placed in detention based on a telephone call from a radio reporter to Miller. It also noted the independent fact that the evening watch lieutenant at El Reno had received information that inmates were saying that if Kimberlin would "snitch" on Quayle he might do the same to them. C.A. App. 49; Pet. App. 5a. The memorandum concluded that based on the telephone call and the information about being called a "snitch," petitioner was being "placed in administrative detention" in order to insure his safety and "until the matter could be throughly [sic] investigated." *Id.* During his detention, petitioner was permitted to speak with Totenberg by telephone, C.A. App. 68, 80,

---

presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate: . . . (5) Requests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection." 28 C.F.R. § 541.22(a) (1988). Among those BOP may consider placing in administrative detention are "[i]nmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm." 28 C.F.R. § 541.23(a)(8) (1988).

95, and made at least seven telephone calls to "news media personnel, family and friends." Pet. App. 14a-15a; C.A. App. 111.

While petitioner was in administrative detention, Goodin again telephoned Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better chance that it would have at least some adverse effect on the Bush/Quayle chances." C.A. App. 85; Pet. App. 5a-6a. According to Miller, Goodin "did not try in any way to influence the department's handling of Kimberlin." C.A. App. 85; Pet. App. 6a. Goodin also "denied seeking or receiving any 'reassurances' from Miller" or "ever speaking with anyone at the Bureau." Pet. App. 6a. Similarly, Director Quinlan "stated that the Bureau received only a single call from the Bush/Quayle campaign regarding Kimberlin" and that call, which only sought information, went not to him but to the Bureau's Office of Public Affairs. *Id.*; C.A. App. 96. No one "from the Bush/Quayle campaign ask[ed] or instruct[ed] the Bureau of Prisons to do anything with regard to this matter." Pet. App. 6a; C.A. App. 96.

At 7:30 p.m. the next day, Saturday, November 5, 1988, more than two full days before the election, the petitioner was released from administrative detention after approximately twenty hours. He returned to the general prison population where he had free access to the telephones and on the following day, Sunday, November 6, was interviewed "on a number of radio talk shows." C.A. App. 81. The petitioner was released from his non-punitive detention after an investigation revealed no threat to his safety and after he stated that he perceived no threat. C.A. App. 68; Pet. App. 6a. That decision was made solely by El Reno officials with no involvement by Director Quinlan. C.A. App. 68. In fact, Quinlan's November 4 action to segregate petitioner from the El Reno general prison population until any

threat could be assessed was the end of his involvement in all matters related to petitioner. The record is similarly devoid of any evidence that Quinlan and Miller ever communicated with each other during the relevant time period.

b. *The November 7 and December 22 Detentions.* Subsequently, the petitioner was placed in administrative detention on November 7, 1988, and again on December 22, 1988, for violating prison telephone regulations. Neither Quinlan nor Miller had any involvement in either detention. Pet. App. 6a-7a, 15a-17a.[7] The regulations permit an inmate, subject to limitations, to use telephones, but not to telephone one party and have that party electronically transfer the call to a third party. 28 C.F.R. § 540.104 (1988). Such "third party calls" are proscribed because they are often used to facilitate illegal activity and to circumvent prison telephone procedures. C.A. App. 78.

Contemporaneous El Reno records reflect that the petitioner was placed in administrative detention on November 7, 1988 because he placed a third-party call to a friend who routed it on to a member of the Dukakis campaign.[8] When confronted with this information, the petitioner first denied but later admitted it to be true. C.A. App. 53, 55-57. Other evidence indicated that peti-

---

[7] The district court determined that Director Quinlan "ordered personally" the November 7 detention. Pet. App. 55a. The court's only cited basis for that conclusion—exhibit F to the first amended complaint—is a December 20, 1988 article from the *New York Times* purporting to attribute that information to Miller. The article is, of course, inadmissible hearsay. The court of appeals found insufficient evidence of any involvement by Quinlan or Miller in the November 7 and December 22 detentions, Pet. App. 15a-17a, and noted that such hearsay "cannot defeat a summary judgment motion." *Id.* at 15a-16a, n.15.

[8] According to the Bureau, it is not unusual under ordinary procedures to place an inmate in administrative detention pending a disciplinary hearing. C.A. App. 69.

tioner was attempting to make third-party telephone calls to facilitate a telephone press conference at the Mayflower Hotel in Washington. C.A. App. 68, 96. Following a hearing on November 14, 1988, petitioner was found guilty of the violation, sanctioned by the forfeiture of two days statutory good time, which was later reduced to a warning, C.A. App. 46, and released from detention later that day. C.A. App. 57, 69, 96; Pet. App. 6a.

On December 22, 1988, the petitioner was again charged by El Reno officials with the violation of third-party telephone rules and placed in administrative detention. A hearing was held the following day, petitioner was found not guilty and he was released from detention. C.A. App. 46-47, 60-63, 110. Again, Quinlan and Miller had no involvement in these events.

2. On July 2, 1990, petitioner filed this action in the United States District Court for the District of Columbia against Quinlan, in both his individual and official capacities, Miller, in his individual capacity, and the United States. The complaint asserted *Bivens*-type claims against Quinlan and Miller for alleged violations of the First and Fifth Amendments and various claims against the United States.[9]

The respondents moved for a protective order prohibiting discovery until the district court could resolve their claim to qualified immunity. The district court largely denied the motion and permitted discovery to proceed "except that which relates exclusively to the *Bivens* claims." C.A. App. 3. The district court subsequently denied respondents' motion for reconsideration of that order. *Id.* at 4. Petitioner then embarked on a campaign of wide-ranging discovery that included both document

[9] The complaint asserted claims against the United States were for assault, battery and false imprisonment under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*, and for violation of Title III of the Organized Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511, arising out of the monitoring of Kimberlin's telephone calls. Pet. App. 44a-64a.

production and the taking of twenty-three depositions ranging from former-Attorney General Thornburgh to El Reno staff personnel. Quinlan, Miller and the petitioner were not deposed.

In August 1991, the district court granted in part and denied in part the respondents' motion to dismiss or for summary judgment. The court dismissed petitioner's Fifth Amendment and assault and battery FTCA claims, but denied the motion as to all remaining claims, including, specifically, the respondents' assertion of an entitlement to qualified immunity. Pet. App. 44a-63a. Only the immunity claims are before this Court. The district court recognized that applicable circuit precedent required plaintiffs asserting *Bivens* claims based upon allegedly unconstitutional motive to meet a heightened pleading standard. The court concluded, however, that petitioner's allegations of unconstitutional motive were "tangible and nonconclusory." Pet. App. 52a.

3. a. Quinlan and Miller noticed an immediate interlocutory appeal. A divided panel of the court of appeals reversed. Judge Henderson, writing for the majority, held that circuit precedent required a plaintiff who alleges a constitutional tort by a government official, in which the outcome hinges on the official's intent or state of mind, to plead and produce "direct evidence" of the improper motive in order to withstand a motion to dismiss or for summary judgment asserting qualified immunity. Pet. App. 8a-12a.

After reviewing the record, Judge Henderson noted with respect to the November 4 detention that "the motive Kimberlin alleges—denying him access to the press—seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others during his detention." Pet. App. 14a. She also noted with respect to the November 4 detention that because Bureau officials "have an obligation to provide

prisoners with reasonable protection from foreseeable violence . . . Quinlan would have been remiss, and risked liability, had he failed to order detention and Kimberlin subsequently came to harm. Of course, by ordering detention Quinlan also risked (and got) a lawsuit." Pet. App. 14a, n.14.

As for the latter two detentions, Judge Henderson found that the record was "devoid of any direct evidence" that either Quinlan or Miller were involved in those detentions. *Id.* 15a-17a. Judge Henderson concluded by stating:

> Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened pleading standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened pleading standard are intended to cut short.

Pet. App. 17a.

Judge Williams concurred but questioned the validity of the direct evidence component of the heightened pleading standard. Pet. App. 17a-19a. Judge Edwards dissented, asserting that he found no basis for a requirement of direct evidence nor of any heightened pleading standard. Pet. App. 20a-21a.

b. The court of appeals denied rehearing and a suggestion for rehearing *en banc*.[10] Judge Williams, in a

[10] Petitioner argues that "more active judges favored rehearing than opposed it." Pet. Br. 17. The record, however, reflects that only four judges voted in favor of rehearing *en banc*, Pet. App. 65a. Nevertheless, on June 23, 1994, the court of appeals denied respondents' request for a correction of Judge Edwards's statement in dissent that five judges voted in favor of *en banc* review and four against. Pet. App. 69a.

statement concurred in by Judges Silberman and Buckley, wrote that the "direct evidence" rule, although imperfect, preserved accountability for constitutional violations based on motive while safeguarding federal officials from the burdens and expense of unwarranted litigation.

> Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money.

Pet. App. 66a. Judge Williams concluded that it was "on balance preferable" to keep the direct evidence rule until the Supreme Court resolves the issue. *Id.* at 66a-67a. Judge Silberman also separately concurred. Judge Edwards, joined by Chief Judge Mikva and Judge Wald, reiterated in dissent the points made in his panel dissent. *Id.* at 72a.

SUMMARY OF ARGUMENT

1. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this Court formulated a wholly objective test to assess a government official's entitlement to qualified immunity. The test seeks to accommodate a damages remedy under the constitution with minimizing the heavy social costs such litigation necessarily imposes on individually sued government officials. Application of *Harlow's* objective test is problematic, however, when unconstitutional motive is an element of a plaintiff's claim, because the question of motive is wholly subjective. The District of Columbia Circuit addresses the problem by applying a heightened pleading standard, whereby a plaintiff is required to submit direct, as opposed to circumstantial, evdence of improper motive to withstand a dispositive motion asserting entitlement to immunity.

2. The direct evidence standard is impelled by: (i) the expansive language in *Harlow* and its progeny em-

phasizing objectivity; (ii) this Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." Like other areas of the law where policy concerns limit the types of evidence that can be used or the inferences that can be drawn from such evidence, the substantive policy concerns undergirding immunity justify the direct evidence standard. Although the standard constrains motive-based *Bivens* cases, it gives substance to the promise that qualified immunity is an "immunity from suit." It also has the benefit of being an easily applied and understood bright-line standard.

Petitioner's and amici's criticism of the direct evidence standard is unwarranted. The standard's goal is not, as petitioner and amici would prefer, to maximize opportunities for motive-based *Bivens* cases to be prosecuted successfully. Rather, the greater public policy objective —protecting officials from meritless claims in improper motive cases—justifies the requirement of direct evidence.

3. Heightened pleading standards in *Bivens* cases are not precluded by the Federal Rules of Civil Procedure. Rather, the substantive right of immunity overrides the application of any procedural rule. If the Court determines, however, that direct evidence is not an appropriate standard, the Court should adopt a "clear and convincing evidence" standard similar to the standard applied in libel cases. It should not adopt the formulation proposed by the Solicitor General because that proposal is effectively no heightened pleading standard at all, and it provides no real protection for public officials.

4. Whatever standard the Court applies to motive-based *Bivens* suits, the respondents should be accorded qualified immunity. The conduct of the respondents was both objectively reasonable and not violative of any clearly established law. Despite extensive discovery, in-

cluding twenty-three depositions, petitioner has fallen far short of demonstrating an improper motive.

ARGUMENT

This case underscores the Court's observation made more than four decades ago, which is particularly apt in *Bivens* cases, that "[i]n times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." *Tenney* v. *Brandhove*, 341 U.S. 367, 377-78 (1951). It is also a case that has defied the Court's admonition in *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978), that "[i]nsubstantial lawsuits" against government officials should be "quickly terminated."

Six and one-half years ago, respondent Quinlan, upon being informed that an acting-warden had scheduled an inmate "press conference," ordered it canceled because inmates possess no constitutional, statutory or regulatory entitlement to press conferences and because inmate press conferences have never been permitted. Upon subsequently being informed later that night of concern for petitioner's safety, Quinlan acted as any responsible Bureau Director would have and instructed the Regional Director to segregate petitioner from the general prison population for his safety and until the extent and nature of any danger could be assessed. Quinlan was *obliged* to take action to protect the petitioner, *Washington* v. *District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986), and, as Judge Henderson noted, would have been "remiss" had he not ordered detention. C.A. App. 14a, n.14.

Miller's alleged actions are even more innocuous. Because Miller, as the then-Director of Public Affairs for the Department of Justice, simply fielded and relayed telephone calls concerning Kimberlin between members of the press and the Bureau—as his position required—and because he received telephone calls during the relevant time period from Mark Goodin of the Bush/Quayle

campaign, he too has been dragged into the mire of this litigation. Although petitioner alleges that the respondent "participated in and furthered a scheme" to prevent him from speaking with the press, the record contains no evidence that respondents ever spoke with each other, let alone conspired or "schemed."

By any measure, respondents should be accorded qualified immunity from petitioner's suit. The court of appeals held in the respondents' favor by applying the direct evidence component of its heightened pleading standard.[11] Although respondents believe, as explained below, that the court's decision should be affirmed via application of a direct evidence standard, even if this Court decides that a different standard is appropriate, respondents are still entitled to qualified immunity because all the petitioner has unearthed to support his claim of unconstitutional motive, after nearly two dozen depositions, is "inference and weak circumstantial evidence, notably the timing of events." Pet. App. 17a.

I. THE APPLICATION OF AN OBJECTIVE QUALIFIED IMMUNITY TEST IN UNCONSTITUTIONAL MOTIVE CASES HAS IMPELLED THE CREATION OF A HEIGHTENED PLEADING STANDARD.

This case presents the question of how to apply the doctrine of qualified immunity to cases where plaintiffs sue government officials in their individual capacities and assert that the officials acted with an unconstitutional motive. The genesis of this legal dispute is the Court's decision in *Harlow* v. *Fitzgerald*, which fundamentally altered the method of determining whether an official is entitled to qualified immunity.

1. The doctrine of qualified immunity reconciles two important but countervailing interests: (i) providing a

[11] Although the standard commonly referred to as a "heightened pleading" standard, that is a misnomer. As the court of appeals noted, "heightened production" is probably the better characterization in the summary judgment context. Pet. App. 9a, n.8.

damages remedy to vindicate constitutional guarantees; and (ii) minimizing the heavy social costs imposed by litigation against public officials in their individual capacities. *Harlow* v. *Fitzgerald*, 457 U.S. at 814 (citing *Butz* v. *Economou*, 438 U.S. at 506 and *Bivens*, 403 U.S. at 410). Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 112 S.Ct. 1827, 1833 (1992).

This Court has recognized that *Bivens* suits "frequently run against the innocent," and impose a heavy cost "not only to the defendant officials but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. There is also "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.*, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Thus, it is vital to protect officials from such claims with a vigorous application of qualified immunity "at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991); *Siegert* v. *Gilley*, 500 U.S. 226, 231-32 (1991).[12]

The "essence" of qualified immunity is "its possessor's entitlement not to have to . . . stand trial or face the other burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817; *Anderson* v. *Creighton*, 483 U.S. 635, 646, n.6 (1987). Because qualified immunity is "an *immunity from suit* rather than a mere

---

[12] The same rationale applies to suits brought pursuant to 42 U.S.C. § 1983. *Butz* v. *Economou*, 438 U.S. at 499-503.

defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. at 526 (emphasis added); *Siegert* v. *Gilley*, 500 U.S. at 232.

In the years immediately following *Bivens*, an official's entitlement to qualified immunity was evaluated by application of a two-part test composed of objective and subjective factors. *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974); *Wood* v. *Strickland*, 420 U.S. 308, 321-22 (1975). In *Harlow* v. *Fitzgerald*, however, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson* v. *Creighton*, 483 U.S. at 645, and applied an objective test to evaluate claims of entitlement to qualified immunity. The Court jettisoned the subjective, good faith element of qualified immunity because evaluation of that subjective issue "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16. Thus, after *Harlow*, government officials are entitled to qualified immunity so long as their conduct is "objectively reasonable" and does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Two years after *Harlow*, the Court, in *Davis* v. *Scherer*, 468 U.S. 183 (1984), considered again the objective reasonableness standard of qualified immunity. The Court reiterated the holding in *Harlow*, noting that it had "rejected the inquiry into state of mind in favor of a wholly objective standard" and that "[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *No other 'circumstances' are relevant to the issue of qualified immunity.*" 468 U.S. at 191, (emphasis added) (citation omitted). Subsequent decisions have similarly reaffirmed *Harlow*'s objective standard. *See Mitchell* v. *Forsyth*, 472

U.S. at 517 (*Harlow* "purged qualified immunity doctrine of its subjective components"); *Anderson* v. *Creighton*, 483 U.S. at 641 (whether a warrantless search "was objectively legally unreasonable . . . will often require examination of the information possessed by the searching officials [but] this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize"). *See also Halperin* v. *Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986) ("objectification" of qualified immunity under *Harlow* "not even *nearly* achieved" unless *Harlow* is read to preclude motive-based *Bivens* claims.) (Scalia, J.) (emphasis in original).

2. Under *Harlow*'s objective standard, an official is presumed to act in good faith and that presumption is irrebuttable, so long as his or her objective conduct violates no clearly established right. Thus, *Harlow* and its progeny could—and perhaps should—be read to bar a plaintiff from even bringing a *Bivens* suit that turns solely on a public official's allegedly unconstitutional motive. *Halperin* v. *Kissinger*, 807 F.2d at 184-87; *Smith* v. *Nixon*, 807 F.2d 197, 201 (D.C. Cir. 1986) (allegedly improper "subjective intent" is "irrelevant").

The lower courts generally have thought that result too harsh and have declined to read *Harlow*'s language so broadly "without more specific indication that that was intended." *Halperin*, 807 F.2d at 186; *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1986) ("We do not think . . . the *Harlow* decisional line reaches that far.") (R. Ginsburg, J.); *Kenyatta* v. *Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).[13] Yet, as

[13] The Eleventh Circuit recently noted, however, that "[f]or qualified immunity purposes, the subjective motivation of the defendant-official is irrelevant." Thus, "*Harlow's* objective standard would be rendered meaningless if a plaintiff could overcome a sum-

the court of appeals observed in *Martin*, reading *Harlow* less expansively where unconstitutional motive is alleged, creates a problem because motive necessarily encompasses a subjective component:

> The 'clearly established law' and 'objective reasonableness' facets of current qualified immunity doctrine tug in opposite directions where, as here, the 'clearly established law' itself contains a subjective component.

812 F.2d at 1432. Citing *Harlow*'s expressed need to balance a "prompt termination of vexatious litigation against public officials" with "the countervailing need to provide a 'realistic avenue for vindication of constitutional guarantees,' " the court concluded:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. *That is some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial.*

812 F.2d at 1435 (emphasis supplied).[14] *Accord Whitacre* v. *Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989),

---

mary judgment motion based on qualified immunity by injecting the defendant's state of mind into the pleadings." *Hansen* v. *Soldenwagner*, 19 F.3d 573, 578 (11th Cir. 1994).

[14] In fashioning this test, the court contemplated "some space for discovery" in applying the standard: "Allowing plaintiffs to raise certain claims of unconstitutional motive would become an empty gesture were we to impose a blanket restriction on *all* discovery prior to the resolution of the qualified immunity issue on summary judgment." 812 F.2d at 1437 (emphasis in original). As the direct evidence standard has been reiterated, the court of appeals generally has backed away from permitting discovery on

cert. denied, 497 U.S. 1038 (1990); *Siegert* v. *Gilley*, 895 F.2d at 801-02.[15]

The court explained that because motive encompasses a subjective component, a *Bivens* plaintiff alleging unlawful motive could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801; *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Thus, faced with the dilemma of how to deal with motive in assessing qualified immunity, the court of appeals properly concluded that *Harlow* "impels the application of a standard more demanding of plaintiffs." *Martin*, 812 F.2d at 1435.[16]

---

motive-based issues in the qualified immunity context. *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991). Of course, in this case, petitioner was permitted to conduct very extensive discovery.

[15] Recently, in *Kartseva* v. *Dep't. of State*, 37 F.3d 1524, 1531 (D.C. Cir. 1994), the court of appeals explained that it has a two-tiered heightened pleading standard. Direct evidence is required only when the outcome of a case "depends on the defendant's state of mind." Where the outcome does not turn on motive, heightened factual detail is all that is required to assess entitlement to qualified immunity.

[16] As Judge Henderson noted, while no other circuit court has adopted the direct/circumstantial test employed by the District of Columbia Circuit, most courts of appeals adopted some form of heightened pleading standard in response to *Harlow*. Pet. App. 9a-11a & n.10 (citing cases). *See Elliott* v. *Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) (seeks to resolve the "conundrum" created by *Harlow* by requiring plaintiff to produce "specific nonconclusory factual allegations which establish [the necessary mental state], or face dismissal."); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 649-50 (10th Cir. 1988) (Court agrees that *Harlow* "impels" application of heightened pleading standard where qualified immunity asserted).

II. THE DIRECT EVIDENCE STANDARD IS IMPELLED BY THE COURT'S DECISION IN *HARLOW*.

1. The array of options for resolving motive-based *Bivens* claims spans the spectrum "from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent." Pet. App. 66a (Williams, J. concurring). The height at which the bar is set depends upon "the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money." *Id.* *Harlow* mandates that the bar be set quite high.

Ths Court admonished in *Harlow* that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18. The Court further held that government officials should only be subjected to those costs and burdens on the basis of a wholly objective standard. *Id.* The creation of the heightened pleading standard with its direct evidence component for motive-based *Bivens* claims is impelled by the concern that the application of a lesser pleading standard would effectively reimpose "precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson*, 737 F.2d at 29.

The direct evidence test falls close to that end of the spectrum that does not permit inquiry into subjective motive. But that is understandable given: (1) the expansive language of *Harlow* and its progeny emphasizing objectivity in assessing entitlement to qualified immunity; (2) the Court's directive to determine entitlement to qualified immunity at the earliest possible stage of litigation; and (3) the need to prevent officials from being distracted and burdened by insubstantial suits.

Importantly, the rule is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence. Rather, the policy reasons for qualified immunity, which this Court has repeatedly emphasized, explain the imposition of a direct evidence restriction in the *Bivens* context. In short, the use of the direct evidence formulation serves to protect officials from suit while permitting meritorious claims to go forward.

As the court of appeals explained in *Martin*, it is not "extraordinary" to limit the type of evidence that can be considered, or the inferences that can be drawn from evidence, based upon substantive policy concerns. 812 F.2d at 1435-36. Antitrust, conspiracy and fraud cases all require something beyond bare allegations to survive summary judgment. *Id.*, citing, *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (where antitrust conspiracy alleged, "mistaken inferences . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect."); *Compare First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968) (circumstantial evidence of conspiracy insufficient to take the case to the jury where inference of nonconspiratorial conduct equally plausible).

Other examples of such evidentiary limitations abound. For example, traditionally under both the common law and federal law, the need to protect witnesses from being deterred from providing honest testimony has justified very strict evidentiary standards for proving perjury, generally requiring "direct" evidence and two witnesses. *See Weiler* v. *United States*, 323 U.S. 606 (1945); 60A Am. Jur. 2d *Perjury* §§ 96-97. Indeed, the "two witness" rule furnishes a useful analogy. Like the rule of qualified immunity, which is based on claims to special procedural protection arising out of public policy concerns articulated in *Harlow*, the "two witness" rule is based upon

the perceived need "to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions," *Weiler*, 323 U.S. at 609, not upon some generally applicable rule of evidence.

Indeed, entire types of evidence are quite frequently excluded from consideration based upon policy grounds wholly apart from the credibility, strength or probative value of the evidence. *See e.g.* Fed. R. Evid. 407 (remedial measures), 408 (offers of compromise), 409 (payment of medical expenses); 1 *McCormick on Evidence*, (4th ed. 1992), 313-67 (attorney-client privilege), 292-312 (marital communications privilege), 368-92 (physician-patient privilege).

Thus, there are many areas in the law where different evidentiary limitations are applied to advance a particular public policy. Here the policy reasons undergirding the objective approach to qualified immunity justify the strict constraints imposed by he direct evidence rule when the question of motive is injected into the equation. The rule furthers the important public policy of protecting a government official's ability to exercise discretion without the constant threat of personal liability based upon what inferences about his or her state of mind might later be drawn by another, or about how a particular set of circumstances might be perceived by another. The import of this protection is great because the more delicate, important or controversial the policy decision, the greater the threat of personal liability based upon mistaken or partisan inferences. Thus, the standard permits government officials to act based on proper considerations, not based on whether their actions may be misconstrued by others and the threat of personal liability.

Although requiring direct evidence severely constrains motive-based *Bivens* cases, it does not foreclose them altogether. Direct evidence that a government official acted with an unconstitutional purpose is not, as peti-

tioner suggests, impossible to obtain. *See, e.g., Davis* v. *Passman*, 442 U.S. 228 (1979) (direct evidence in the form of a letter from defendant). Rather, the direct evidence standard represents the circuit court's judgment as to the appropriate balance between the competing and conflicting concerns identified in *Harlow*. Although the rule may screen out an occasional meritorious case, far more often it gives meaningful substance to the important public policy that qualified immunity is an immunity from suit.

Importantly, the direct evidence standard has the added benefit of being an easily applied and easily understood bright-line formulation. This Court has long recognized that bright-line standards are "important and necessary in many areas of the law, including constitutional law." *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 392 (1983) (applying bright-line test in a regulatory context); *Quill Corporation* v. *North Dakota*, 112 S. Ct. 1904 (1992) (applying bright-line test in sales and use tax context). Such bright-line rules encourage settled expectations and discourage protracted and meritless litigation. *Bowsher* v. *Merck & Co., Inc.*, 460 U.S. 824, 842, n.18 (1983). Like other bright-line tests, direct evidence sometimes "appears artificial at its edges," *Quill Corp.*, 112 S. Ct. at 1914, but, on balance, it vindicates legitimate and very important public purposes which far outweigh any perceived unfairness at the margins.

2. The criticism levelled at the direct evidence rule by petitioner and the Solicitor General is unwarranted because, as noted by Judge Silberman below, it "focuses on the trees rather than the forest." Pet. App. 67a. Petitioner and amici argue that the rule should be repudiated because it rejects "even strong claims in the salutary effort to eliminate unfounded ones." SG Br. 19; Pet. Br. 24. But they fail to acknowledge that the natural consequence of their approach will be that all man-

ner of insubstantial claims will survive, through burdensome discovery and into trial—and qualified immunity will thereby be lost—in order to preserve the occasional meritorious claim. *Harlow* does not contemplate that result. Indeed, the Court has recognized that qualified immunity is designed to protect officials who err because "it is better to risk some error and possible injury from such error than not to decide or act at all." *Scheuer* v. *Rhodes*, 416 U.S. at 242; *Davis* v. *Scherer*, 468 U.S. at 196.

There also is no merit to the contention that the direct evidence standard conflicts with this Court's precedents. To be sure, this Court has recognized in other settings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland* v. *United States*, 348 U.S. 121, 140 (1954). The Court, however, was not addressing the issue presented here—the need to require a litigant to adduce a certain type of evidence in order to satisfy extrinsic policy considerations such as immunity.

Nor is it persuasive that because circumstantial evidence is permitted in criminal cases to meet the beyond a reasonable doubt standard, it is appropriate to permit such evidence in this context. Unquestionably, circumstantial evidence can be probative of a defendant's state of mind, and it is commonly utilized in both civil and criminal cases for that purpose. Therefore, if the objective were simply to maximize the opportunity for meritorious motive-based *Bivens* claims to be prosecuted successfully, then circumstantial evidence should be considered. In *Bivens* cases, however, there is the countervailing and greater objective of preserving qualified immunity for public officials.

The strong policy rationales for a prompt and objective resolution of the immunity issue, as articulated in *Harlow*, simply outweigh the competing concerns of plaintiffs seeking to pursue improper-motive claims against in-

dividual officials. Although this approach may occasionally result in the dismissal of a meritorious case, "that, alas, is exactly what immunity means: that the ability to obtain monetary damages for a wrong must sometimes yield to the need to protect public officials (and ultimately the public itself)." *Smith* v. *Nixon*, 807 F.2d at 203 (Scalia, J.); *Scheuer* v. *Rhodes*, 416 U.S. at 242.

In any event, petitioner's and amici's complaint about the purported unfairness of having to prove unconstitutional motive by direct evidence and without discovery is of no consequence in this case. After five years of litigation and protracted discovery, including twenty-three depositions, petitioner has completely failed to demonstrate an unconstitutional motive by respondents.

III. IF THE COURT REJECTS THE DIRECT EVIDENCE STANDARD, IT SHOULD NEVERTHELESS APPLY A MEANINGFUL HEIGHTENED STANDARD THAT REALISTICALLY PRESERVES QUALIFIED IMMUNITY IN MOTIVE-BASED *BIVENS* SUITS

If the Court chooses to reject direct evidence as the standard applicable to motive-based *Bivens* claims, it nevertheless should require some meaningful form of a heightened pleading requirement in order to effectuate the rationale of *Harlow*. The Court should not, however, adopt the approaches proposed by petitioner or amici, including the Solicitor General, which range from no heightened pleading standard at all, to a formulation that sets the bar so low as to be, in effect, no heightened pleading standard.

1. Initially, petitioner, relying on this Court's recent decision in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), argues that the Federal Rules of Civil Procedure provide no basis for any heightened pleading standard. That is

incorrect. In *Leatherman*, this Court held that heightened pleading of claims against municipalities under 42 U.S.C. § 1983 is not required. The Court, however, expressly declined to rule on the issue of heightened pleading in qualified immunity cases. 113 S. Ct. at 1162. Emphasizing that the case before it involved a municipal defendant not entitled to immunity, the Court stated that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

Apart from the obvious—that *Leatherman* specifically refrained from addressing the issue presented in this case —that decision provides no basis for a conclusion that the Federal Rules of Civil Procedure foreclose heightened pleading standards in the *Bivens* context. Indeed, requiring heightened specificity in *Bivens* cases is consistent not only with the emphasis in *Anderson* v. *Creighton* on the "particularized" manner in which the immunity inquiry is to be undertaken, 483 U.S. at 640, but also with a "firm application" of Rule 8's mandate that a plaintiff demonstrate his or her entitlement to the relief sought. *Leatherman* did not alter those principles.

Moreover, qualified immunity is an affirmative defense, and thus, generally arises only when the defendant asserts it in a Rule 12 motion to dismiss or in a Rule 56 motion for summary judgment. When such a motion is filed, the defendant's substantive right to qualified immunity makes it incumbent upon the plaintiff, at a minimum, to respond with specific, concrete facts supporting the plaintiff's general averment of malice or improper motive. *See* Fed. R. Civ. P. 56(e) (requiring through affidavits and other evidence "specific facts showing there is no genuine issue for trial"). To conclude otherwise would abrogate the substantive immunity possessed by public officials that is intended to free them from the burdens of litigation.

Because qualified immunity is a substantive right, it trumps any federal procedural rule pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Thus, "[t]o the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity." *Schultea* v. *Wood*, 1995 WL 98234, *10 (5th Cir. March 9, 1995) (en banc) (Jones, J., concurring). *But see Elliott* v. *Thomas*, 937 F.2d at 345. Accordingly, there is no merit to the assertion that *Leatherman* or the Federal Rules foreclose heightened pleading requirements in the qualified immunity arena.[17]

2. While petitioner and amici argue that no heightened pleading standard is appropriate, the Solicitor General proposes a standard whereby a plaintiff must respond to a claim to qualified immunity "with a *factually specific* statement of the claim that a clear right has been violated." SG Br. 20. (emphasis in original). The Solicitor General, in seeking to avoid Scylla, has steered into Charybdis. With respect, the standard the Solicitor General proposes is no standard at all. It provides no real protection for the official sued in a *Bivens* action because it is no burden for a plaintiff to compose a factually specific statement identifying the violation of a clear right. The application of such an approach, when improper motive is an element of the underlying claim, is sure to

---

[17] The courts of appeals have responded in a myriad of ways to *Leatherman*. For example, some have continued to adhere to a heightened pleading standard in improper motive *Bivens* cases. *Branch* v. *Tunnell*, 14 F.3d 449, 456-57 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994); *Kartseva* v. *Dep't of State*, 37 F.3d at 1531. By contrast, the Seventh Circuit has concluded *Leatherman* precludes any heightened pleading standard, *Black* v. *Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994). Most recently, the Fifth Circuit has adopted an entirely different and unique approach that relies on a use of Fed. R. Civ. P. 7. *Schultea* v. *Wood*, 1995 WL 98234.

lead to the very burdens qualified immunity is intended to foreclose.[18]

Moreover, the proposed standard is meaningless because it fails to address the *quality* of the evidence relied upon by the plaintiff making his or her factually specific claim, or to focus on the evidence of malice or improper motive. As such, it is clearly distinguishable from, and far less protective of public officials than, for example, the standard discussed by Justice Kennedy in *Siegert*, and later in *Wyatt*, whereby a plaintiff would be required to "put forward specific, nonconclusory factual allegations *which establish malice*, or face dismissal." *Siegert* v. *Gilley*, 500 U.S. at 236 (Kennedy, J., concurring) (emphasis added); *Wyatt* v. *Cole*, 112 S.Ct. at 1835-37 (Kennedy and Scalia, JJ., concurring). Justice Kennedy's formulation clearly links a plaintiff's requisite factual specificity to the actual establishment of malice. By contrast, the Solicitor General's proposal merely requires factual specificity coupled with an averment that a clear right has been violated. As such, it affords no protection for the unlucky official accused of acting with an unlawful purpose.

The Solicitor General's suggested approach also represents a retreat from the test the Solicitor General previously advocated in *Siegert*—that in improper motive cases a court must dismiss on the pleadings unless the plaintiff alleges "specific and concrete facts that raise a genuine issue as to the objective reasonableness" of the defendant's conduct. C.A. App. 138, n.13. That articulation, as well, had the benefit of forcing an early evaluation of whether the "specifically alleged facts" raised a "genuine issue"

---

[18] The standard proposed by the Solicitor General may well be appropriate in non-motive based *Bivens* cases. The proposal makes no distinction, however, between motive and non-motive based claims. SG Br. 23-24, n.24.

as to whether an official's conduct was objectively reasonable. Accordingly, the respondents urge the Court to reject in *Bivens* cases where improper motive is at issue, the proposals advanced here by the Solicitor General.

3. Respondents submit there is another alternative that is far preferable to the Solicitor General's proposal, and worthy of consideration—a "clear and convincing evidence" standard. A bedrock principle of qualified immunity jurisprudence is the concept that an official is entitled to immunity so long as he or she acts in an "objectively reasonable" manner. *Malley* v. *Briggs,* 475 U.S. 335, 341 (1986). Thus, if qualified immunity means anything, it should not be denied to an official when a plaintiff, as here, advances only weak inferences of improper motive.

That concern can be allayed with the application of a clear and convincing evidence standard. Under that approach, a plaintiff alleging improper motive, upon receiving a motion to dismiss or for summary judgment asserting qualified immunity, would be required to support a claim with clear and convincing evidence that demonstrates unlawful motive. Application of this standard would permit a plaintiff to rely on all available evidence in support of his or her claim, without thereby subjecting the defendant official to the burdens of litigation any time that a plaintiff can cobble together, weak facts and circumstances that *might* persuade a jury by a preponderance of the evidence that the defendant acted with an unlawful motive.

The clear and convincing evidence standard, as applied here, would thus work much as it does in the libel setting. An evaluation of summary judgment in an immunity context would, as in the libel setting, require a court to "view the evidence submitted through the prism of the substantive evidentiary burden." *Anderson* v. *Liberty Lobby,* 477 U.S. 242, 254 (1986). Therefore, unless a

plaintiff could respond to an official's claim to qualified immunity with evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence," the defendant official should be accorded immunity. *Id.*

The application of a "clear and convincing" standard is supported by the venerable principle that government officials are presumed to act in good faith absent proof to the contrary. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (the "presumption of regularity . . . supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties"). Thus, for example, when relief is sought directly from the government based upon an alleged bias or impermissible motive on the part of the government official, the lower courts have erected a high barrier to shield the government from unsubstantiated bias claims. Because there is a strong presumption that government officials act in good faith, the courts have held in those contexts that a plaintiff alleging bad faith must come forward with "well-nigh irrefragable proof to overcome the presumption of good faith." *Torncello* v. *United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993).

Clear and convincing evidence is a well-known standard with a long pedigree in the law. It is easily understood and has been employed by the courts in a variety of contexts where public policy justifies requiring a plaintiff to support his claims with strong evidence. *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 282 (1990). For example, recognizing that fraud is simple to allege and is ordinarily a question for a jury, the courts commonly require clear and convincing evidence of fraud to support a tort action. *Woodby* v. *INS*, 385 U.S. 276, 285, n.18 (1966). Clear and convincing evidence of improper motive is also required in libel cases

involving public figures, *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), as well as to prove oral contracts, and in deportation, denaturalization and civil commitment proceedings. *See Cruzan,* 497 U.S. at 282 (citing cases).

As explained in *Cruzan,* this Court has mandated clear and convincing evidence as a standard of proof where the interests at stake are important and involve more than a mere loss of money. 497 U.S. at 282; *Grogan* v. *Garner,* 498 U.S. 279 (1991). The purpose of qualified immunity and the particular dangers of permitting an inquiry into an official's motive,[19] constitute "particularly important" interests that justify the application of a clear and convincing evidence standard where improper motive is alleged in the *Bivens* context.

Respondents submit, therefore, that if the Court rejects the direct evidence standard, it should apply as an alternative, a clear and convincing evidence standard. That standard constitutes a fair, alternative approach that would permit a plaintiff with *strong* evidence of improper motive to proceed, while at the same time allowing government officials to exercise their discretionary functions without fear that their actions will be second-guessed with a money damages lawsuit. Any lesser protection will impose "on officials the very costs and burdens . . . that *Harlow* intended to spare them." *Siegert,* 895 F.2d at 801.

IV. REGARDLESS OF WHICH APPROACH THE COURT ADOPTS, RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Whatever standard the Court ultimately adopts to resolve the competing interests at play in a *Bivens* suit al-

---

[19] *See United States* v. *Morgan,* 313 U.S. 409, 422 (1941) (Frankfurter, J.) (recognizing that probing the mental processes of the Secretary of Agriculture would be "destructive" to the integrity of the administrative process).

leging improper motive, the respondents are entitled to qualified immunity in this case. As the Court observed in *Harlow*, "[f]or executive officers in general, . . . qualified immunity represents the norm." 457 U.S. at 807. Thus, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. at 341. Importantly for this case, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Id.*

Here, despite petitioner's arguments to the contrary, there can be no doubt that the respondents acted at all times in an objectively reasonable manner. There is *no evidence* that respondents acted with an unlawful intent, let alone evidence sufficient to rebut the strong presumption that respondents acted with a lawful intent. There is similarly no evidence that respondents violated any "clearly established law." Federal prisoners possess no constitutional right to be housed in the general prison population in which they are confined. *Hewitt* v. *Helms*, 459 U.S. 460 (1983). Inmates similarly possess no right to contact the media on terms chosen by themselves. *Pell* v. *Procunier*, 417 U.S. at 834; *Saxbe* v. *Washington Post Co.*, 417 U.S. at 849-50.

The district court cited as "evidence" of improper motive Quinlan's cancellation of the November 4 press conference. Yet Quinlan's actions were objectively reasonable and consistent with both his lawful explanation and the wide-ranging deference he as the Bureau Director is to be accorded. *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1976). Bureau regulations permit press contacts and press pools in some circumstances but they plainly do not permit press conferences. Quinlan did not cancel the press conference because of petitioner's message, but rather because he did not want to set a bad precedent for other inmates and because of the potential for dis-

ciplinary problems—a phenomenon this Court has recognized in the prison setting. *Pell* v. *Procunier*, 417 U.S. at 831-32. The fact that NBC News would not have been able to interview peittioner prior to the November 8 election, but for Quinlan's intervention, completely undermines the contention that the press conference cancellation was based on an improper motive.

Similarly, Quinlan's actions resulting in petitioner being placed in administrative detention on November 4, for what turned out to be twenty hours, can only be viewed as objectively reasonable. Whether or not Nina Totenberg actually told Miller that evening that petitioner's life was in danger, she admittedly did tell Miller that petitioner believed he was in danger from the government. C.A. App. 80, 169. By the time that information was filtered through Miller and at least one other person, it was reported to Quinlan that there was concern for petitioner's safety. Quinlan's reaction—having petitioner temporarily placed in administrative detention so that the threat could be assessed—was not only objectively reasonable, it was affirmatively mandated. Had Quinlan not acted to protect petitioner and assess the threat, and had petitioner suffered harm, doubtless he would now be complaining that Quinlan's failure to act was politically motivated. Moreover, petitioner had access to, and utilized, the telephone during his nonpunitive detention.

The allegations regarding Miller are similarly baseless. It can hardly be thought unusual or deemed suspect that Miller, as the Director of the Department of Justice's Office of Public Affairs, was in contact with the Bush/Quayle campaign press officer regarding petitioner's allegations about Quayle. This hardly supports a conclusion that Miller thereby was part of some broad fictional conspiracy to suppress petitioner's speech. Indeed, petitioner has advanced nothing but baseless speculation tying

Miller to any alleged unlawful activity regarding the November 4 detention.[20]

Finally, there is no evidence demonstrating any involvement by Quinlan or Miller in the subsequent November 7 and December 22 detentions. Indeed, there is not a scintilla of evidence that Quinlan and Miller ever spoke to each other during the events at issue. Accordingly, it follows that they are entitled to qualified immunity and this action, insofar as it is against them in their individual capacities, should be dismissed.[21]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL L. MARTINEZ *
STEVEN D. GORDON
WILLIAM J. DEMPSTER
HOLLAND & KNIGHT
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-3000
Attorneys for Respondents

* Counsel of Record

March 1995

---

[20] It should also be noted that Miller's statement to Mark Goodin regarding petitioner's "entitlement" to a press conference was inaccurate. As a government media contact he could not reasonably be expected to be accurate on every nuance of the Bureau's regulations.

[21] This is not a case like *Bivens* where "it is damages or nothing." *Bivens*, 403 U.S. at 410; *Harlow*, 457 U.S. at 814. The petitioner still has unresolved claims against the United States pending in district court.

(8)

APR 19 1995

OFFICE OF THE CLERK

No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT
Counsel of Record
ELLEN S. WINTER
KATHLEEN M. GRABER
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner

21 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES.....ii

I. THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE PRECLUDES A DIRECT EVIDENCE STANDARD.....2

A. Respondents Distort the Necessary Balance Between The Rights of Citizens To Be Free of Constitutional Misconduct and the Qualified Immunity of Government Officers.....2

B. *Harlow v. Fitzgerald* Demands "Firm Application" of the Federal Rules of Civil Procedure, Not a "Direct Evidence" Pleading Standard.....4

C. The Direct Evidence Rule Furthers No Legitimate "Extrinsic Policy Considerations".....11

II. THE FEDERAL RULES OF CIVIL PROCEDURE PRECLUDE A DIRECT EVIDENCE STANDARD.....13

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....7,8

Barss v. Tosches, 785 F.2d 20 (1st Cir. 1986).....8

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....2,3

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994).....12

Brooks v. Andolina, 826 F.2d 1266 (3d Cir. 1987).....6

Burnham v. Oswald, 342 F. Supp. 880 (W.D. N.Y. 1972).....6

Butz v. Economou, 438 U.S. 478 (1978).....4,9

Carlson v. Green, 446 U.S. 14 (1980).....3

Cavey v. Levine, 435 F. Supp. 475 (D. Md. 1977), *aff'd mem.*, 508 F.2d 1047 (4th Cir. 1978).....6

Clements v. County of Nassau, 835 F.2d 1000 (2d Cir. 1987).....8

Crutcher v. Kentucky, 883 F.2d 502 (6th Cir. 1989).....13

Davis v. Passman, 442 U.S. 228 (1979).....12

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 502 U.S. 1121 (1992).....7,12

Farmer v. Brennan, 114 S. Ct. 1970 (1994).....10,11

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).....3

Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 426 U.S. 904 (1976).....8

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....*passim*

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).....12,15

Holland v. United States, 348 U.S. 121 (1954).....1

In re Apple Computer Securities Litigation, 886 F.2d 1109 (9th Cir. 1989), *cert. denied*, 496 U.S. 943 (1990).....8

Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit, 113 S. Ct. 1160 (1993) 13,14

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....2

Meiri v. Dacon, 759 F.2d 989 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) 8

Mitchell v. Forsyth, 472 U.S. 511 (1985) 4,7

Pell v. Procunier, 417 U.S. 817 (1974).....6

Schultea v. Wood, No. 93-2186, 1995 U.S. App. LEXIS 4673 (5th Cir. Mar. 9, 1995) 15

Siegert v. Gilley, 500 U.S. 226 (1991) 13

Tompkins v. Vickers, 26 F.3d 603 (5th Cir. 1994) 11,12

Turner v. Safley, 482 U.S. 78 (1987) 6

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 12

Wood v. Strickland, 420 U.S. 308 (1975) 5

Wyatt v. Cole, 112 S. Ct. 1827 (1992) 2

STATUTES AND RULES

28 U.S.C. § 1915(d) 14

Fed. R. Civ. P. 1 13

Fed. R. Civ. P. 9(b) 15

Fed. R. Civ. P. 11 14

Fed. R. Civ. P. 16 14

Fed. R. Civ. P. 26(b) 14

Fed. R. Civ. P. 26(c) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief explained that the District of Columbia Circuit's rule requiring "direct" evidence of intent arbitrarily eliminates meritorious *Bivens* claims while furthering none of the goals of qualified immunity. Because "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), the rule randomly sacrifices legitimate civil rights claims, arising from the violation of clearly established constitutional guarantees, for reasons that are wholly unrelated to the strength of the claim. The rule represents the triumph of form over substance, allowing the most egregious wrongdoer to act with impunity while depriving his victim of the "very

essence of civil liberty [which] certainly consists of the right of every individual to claim the protection of the laws . . . ." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). So inescapable is this conclusion that even respondents acknowledge that the direct evidence rule "is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence." Resp. Br. 22.

Despite the illogic of the direct evidence rule, respondents assert it is nevertheless "impelled" by this Court's jurisprudence, specifically the decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Resp. Br. 21. But no decision of this Court requires the arbitrary standard that the District of Columbia Circuit applies to civil rights actions. To the contrary, the precedents of this Court require reversal of the decision below.

I. THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE PRECLUDES A DIRECT EVIDENCE STANDARD

A. Respondents Distort the Necessary Balance Between The Rights of Citizens To Be Free of Constitutional Misconduct and the Qualified Immunity of Government Officers

This Court has long recognized that qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting [the] government's ability to perform its traditional functions." *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992). *See* Pet. Br. 21-22. In contrast to the balance this Court requires, respondents posit a standard that

would confer virtually absolute immunity on officials and would dismiss substantial claims of constitutional violations. To be sure, the qualified immunity granted to officials reflects important public policy considerations. Within the parameters of clearly established constitutional standards, public officials should be free to engage in the "'unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). In contrast to the public official's immunity, which "is grounded on principles of public policy" (Gov't Am. Br. 12), the plaintiff's right to seek redress for the violation of clearly established rights is rooted not only in sound public policy, but in the Constitution itself.

A remedy for constitutional wrongdoing responds to the manifest need to protect citizens from persons who, because they act in the name of the United States, "possess[] a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens*, 403 U.S. at 392. This need is particularly apparent in the prison context which, like any area of extensive government regulation and control, "offer[s] opportunities for unconstitutional action on a massive scale." *Butz v. Economou*, 438 U.S. 478, 506 (1978). There is, accordingly, no merit to respondents' contention that the public policy interests advanced by an official's immunity may "outweigh" the constitutional rights of *Bivens* plaintiffs. Resp. Br. 25.[1]

---

1 The same standards of qualified immunity apply to *Bivens* and Section 1983 cases. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials

Respondents' distortion of the requisite balance is not supported by policy, precedent, or the practicalities of government. As this Court made clear in rejecting many of the same arguments respondents assert: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

B. *Harlow v. Fitzgerald* Demands "Firm Application" of the Federal Rules of Civil Procedure, Not a "Direct Evidence" Pleading Standard

1. The dispute in this case stems largely from the parties' radically different interpretations of this Court's formulation of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Respondents contend that *Harlow* implicitly granted officials an "irrebuttable" presumption of good faith (Resp. Br. 18) and that the case "impels" erection of a heightened pleading standard that is mentioned nowhere in the case and can be satisfied only in the fortuitous circumstance where a claimant unearths direct evidence of intent without the benefit of discovery. *Id.* at 21.[2] Respondents would expand *Harlow* beyond recognition.

---

guilty of the same constitutional transgression") (quoting *Butz*, 438 U.S. at 504).

[2] Respondents incorrectly suggest that the record in this case contains some 23 depositions. (Resp. Br. 10, 14, 15.) When the final brief on the qualified immunity motion was filed in the district court, petitioner had taken only *one* deposition. That witness was not a government employee. Brief excerpts of two other deposition transcripts were submitted to the court prior to its determination on the motion. The extensive factual discussion

Prior to *Harlow*, civil rights plaintiffs could defeat a claim of qualified immunity by alleging that the official knew that his or her action violated existing law, or that the action was motivated by malice. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 322 (1975) (public official liable if "he knew or reasonably should have known that the action he took...would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . .") At that time, it was generally accepted that issues involving state of mind were peculiarly unsuited for summary determination. Accordingly, the Court observed in *Harlow* that "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 816. Concerned that "bare allegations" of malice would suffice to usher defendants to trial, the Court made an official's subjective knowledge of governing law irrelevant to the qualified immunity analysis. *Id.* at 817. It held that, regardless of the official's subjective knowledge of the law, he or she is entitled to immunity so long as his or her conduct does not violate "clearly established" constitutional rights of which a reasonable official would have known. *Id.* at 818.[3]

---

contained in petitioner's opening brief rests solely on the actual record before the district court at the time it rendered its decision.

3 There is no issue before the Court in this case concerning whether the rights were clearly established. The district court correctly held that it was clearly established that prisoners have a constitutional right to be free of content-based restrictions on speech and respondents did not contest that point in the court of appeals. Accordingly, respondents' references (Resp. Br. 33-34) to

The ***only*** subjective issue *Harlow* addressed was the official's knowledge of the state of the law. There is, therefore, no merit to respondents' argument that this Court's concern over "bare allegations of malice" should be interpreted to "impel" a direct evidence standard when weighing the sufficiency of the factual evidence against defendants. Nothing in *Harlow* suggests the application of any heightened pleading standard, let alone one that prohibits reliance on circumstantial evidence of intent. "Neither *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified immunity defense is raised." Gov't Pet. Am. Br. 12 n. 9. Far from providing the impenetrable shield respondents suggest, *Harlow* expressly reiterated the importance of "damage actions against high officials" and sought to maintain a "realistic avenue for

---

this issue are both untimely and insubstantial. With regard to the constitutional rights asserted in the complaint, this Court has long held that prison regulations must "operate[] in a neutral fashion, without regard to the content of the expression . . . ." *Pell v. Procunier*, 417 U.S. 817, 828 (1974). *See Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *see also Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987); *Cavey v. Levine*, 435 F. Supp. 475 (D. Md. 1977), *aff'd mem.*, 580 F.2d 1047 (4th Cir. 1978); *Burnham v. Oswald*, 342 F. Supp. 880, 889 (W.D. N.Y. 1972). As the district court observed, it was clearly established prior to November 1988, that "federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." Pet. App. 47a. In short, "[p]rison walls do not form a barrier separating inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. *See* Pet. Br. 9 n.6.

vindication of constitutional guarantees." 457 U.S. at 809, 814.

Respondents complain that, in the absence of an insurmountable direct evidence standard, public officials face a threat of liability when they act contrary to clearly established rights. But, "this is precisely the point of the *Harlow* standard: 'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he ***should*** be made to hesitate . . . .'" *Mitchell*, 472 U.S. at 524 (quoting *Harlow*, 457 U.S. at 819) (emphasis added by the Court). Under a "direct evidence" standard, in contrast, officials may knowingly and willfully violate clearly established constitutional rights with impunity so long as they do not voluntarily confess to wrongdoing. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed"), *cert. denied*, 502 U.S. 1121 (1992); Pet. App. 18a (Williams, concurring) (same). *Harlow* neither compels nor even supports that result.

2. Four years after *Harlow*, this Court held that factual issues concerning state of mind are as susceptible to summary judgment determinations as any other factual issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, this Court flatly rejected the argument that "the defendants should seldom, if ever, be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." *Id.* at 256. To defeat a motion for summary judgment where state of mind is at issue, the Court explained, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be

evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. To avoid summary judgment, the plaintiff must offer "concrete" and "affirmative" evidence that points to unlawful intent or face dismissal. *Id.* at 257. A plaintiff "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial." *Id.* at 248. In light of *Anderson*, there is far less basis for concern than there was when *Harlow* was decided that insubstantial claims implicating a defendant's intent will necessarily proceed to trial.

Since this Court's decision in *Anderson*, the lower courts have carefully scrutinized allegations of improper motive or intent and have granted defendants' motions for summary judgment where plaintiffs offer only "bare allegations." *See, e.g., In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (upholding summary judgment on scienter issue), *cert. denied*, 496 U.S. 943 (1990); *Clements v. County of Nassau*, 835 F.2d 1000, 1006 (2d Cir. 1987) ("summary judgment is appropriate even when state of mind is at issue"); *Barss v. Tosches*, 785 F.2d 20, 23 (1st Cir. 1986) (a party against whom summary judgment is sought is not entitled to trial "'simply because he has asserted a cause of action to which state of mind is a material element. There must be an indication that he can produce the requisite quantum of evidence to enable him to reach a jury with his claim'") (quoting *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied*, 426 U.S. 904 (1976)); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.) ("The summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion."), *cert. denied*, 474 U.S. 829 (1985).

Thus, after *Anderson v. Liberty Lobby*, "bare allegations" of malice no longer suffice to usher public officials (or any other defendants) to trial. Insubstantial damages suits involving constitutional violations "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity" and "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508. Special pleading or production rules are neither essential nor warranted to protect officials from the undue distractions of court proceedings in insubstantial cases.

Petitioner has more than satisfied the appropriate standard.[4] His claim should be permitted to proceed.

---

4 Respondents' brief joins issue on a number of factual contentions that confirm the inappropriateness of summary judgment. Respondents' contention (Resp. Br. 34) that Quinlan's intervention permitting NBC News to interview petitioner "completely undermines" the allegation that his subsequent actions were taken to stifle petitioner's speech ignores Quinlan's admission that petitioner's perceived "lack of credibility, and the likelihood of unnecessarily precipitating a 'cover-up' story just before the election, were major factors in the decision to permit the original NBC interview." CA App. 94. Similarly, respondents' contention that "petitioner had access to, and utilized, the telephone" during his detention (Resp. Br. 34) ignores the order that issued when petitioner attempted to use the phone: "NO! MORE PHONE CALL FOR THIS INMATE, per Lt. Garvue." CA App. 87. Moreover, the government's contention that it was not until after the district court ruled on the qualified immunity motion that petitioner disclosed that he was permitted to call Nina Totenberg (Gov't Am. Br. 6 n.5) is inaccurate. The information was contained in petitioner's complaint (Pet. Br. App. A9) and in a declaration of Ms. Totenberg submitted in opposition to the motion for qualified immunity. CA App. 80 ("It was a fairly acrimonious conversation and I demanded that Kimberlin be

3. There is no merit to respondents' even more extreme argument that *Harlow* "could -- and perhaps should -- be read to bar a plaintiff from even bringing a *Bivens* suit that turns solely on a public official's allegedly unconstitutional motive." Resp. Br. 18. That argument contradicts this Court's precedents, and every court that has addressed the question has expressly rejected respondents' contention. As the Solicitor General has observed: "Like all other circuits that have considered the question, the District of Columbia Circuit considered and rejected the notion that *Harlow's* statement that 'bare allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad-reaching discovery,' 457 U.S. at 817-18, rendered defendants completely immune from intent based constitutional damage claims." Gov't Am. Br. 16 n. 14. *Harlow* itself, which involved an alleged retaliatory termination of employment, turned on the official's motive. By no reasonable stretch can it be said, therefore, that *Harlow* supports a ban on unlawful motive cases.

Far from precluding inquiry into the state of mind of public officials, this Court recently held that a plaintiff bringing an Eighth Amendment claim must prove that the "prison official [had] a 'sufficiently culpable state of mind.'" *Farmer v. Brennan*, 114 S. Ct. 1970, 1977 (1994). To violate the Cruel and Unusual Punishment clause of the Eighth Amendment, prison officials must be subjectively aware of a serious risk to an inmate. "[T]he official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also

---

permitted to call me so that I could make sure he was alright. He was taken to a phone and did call me and he was alright.")

draw the inference." *Id.* at 1979. The Court also ruled in *Farmer* that the official's state of mind was "subject to demonstration in the usual ways, including inference from circumstantial evidence . . . ." *Id.* at 1981. Respondents' incorrect reading of *Harlow* is inalterably contrary to *Farmer*. In effect, respondents contend that *Farmer* should be overruled and no Eighth Amendment claim could ever be brought because liability turns on the subjective intent of officials. Neither *Harlow* nor the Constitution permits that result.

C. The Direct Evidence Rule Furthers No Legitimate "Extrinsic Policy Considerations"

Respondents seek to defend the direct evidence rule by equating it with the attorney-client and marital communication privileges, and other rules excluding types of evidence to further "extrinsic policy considerations." Resp. Br. 25. Those other privileges are designed to, and do, advance specific policy objectives. But, the direct evidence rule does not advance the legitimate policy objective of filtering out insubstantial cases; it randomly eliminates *Bivens* suits based solely on the form of evidence. *See, e.g., Tompkins v. Vickers*, 26 F.3d 603, 609 (5th Cir. 1994) ("direct evidence of an improper motive is usually difficult, if not impossible, to obtain. Thus, requiring direct evidence would effectively insulate from suit [defendants] who deny an improper motive in cases such as this."). *See also* Resp. Br. 22 (direct evidence standard "is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence.").

The direct evidence standard is particularly invidious in the context of intent issues. As this Court

has recognized, circumstantial evidence is typically the only indication of state of mind. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n. 30 (1983) (proof of scienter "is often a matter of inference from circumstantial evidence.") *See* Pet. Br. 29.

Respondents are able to muster a single case for the proposition that direct evidence of intent is not "impossible to obtain." Resp. Br. 24. That example, *Davis v. Passman*, 442 U.S. 228 (1979), merely underscores how extreme the direct evidence standard is and how rarely it can be satisfied. In *Davis*, a United States Congressman fired a staff member and subsequently wrote her a letter acknowledging that, although she was "'able, energetic and a very hard worker,'" it was "'essential that the understudy to my Administrative Assistant be a man.'" *Id.* at 230. In short, the defendant voluntarily admitted to violating a clearly established constitutional right. If *Davis* represents the standard, only the most selfless, remorseful or obtuse could be held liable, and that liability would be so certain and undisputed in every case that discovery would be unnecessary and ***plaintiffs*** would prevail on summary judgment.

For these very reasons, the direct evidence rule correctly has been rejected by every other court of appeals that has considered it[5] and has been criticized

---

5 *See Tompkins*, 26 F.3d at 608-609; *Elliott*, 937 F.2d at 345; *Branch v. Tunnell (Branch I)*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

by several members of this Court.[6] These same reasons warrant reversal of the judgment below.

II. THE FEDERAL RULES OF CIVIL PROCEDURE PRECLUDE A DIRECT EVIDENCE STANDARD

1. A further infirmity in the decision below is the erection of a "heightened pleading" standard that is contrary to the Federal Rules of Civil Procedure and this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 113 S. Ct. 1160 (1993). This Court unanimously held that heightened pleading standards are "impossible to square" with the "liberal system of 'notice pleading' set up by [Fed. R. Civ. P. 8(a)]." *Id.* at 1163. The District of Columbia Circuit's heightened pleading standard "is a departure from the usual pleading requirements of Fed. R. Civ. P. 8 and 9(b)." *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring). The direct evidence rule "departs also from the normal standard for summary judgment under Rule 56." *Id.* (Kennedy, J., concurring). There is no basis for carving out an exception applicable only to *Bivens* cases because, by their express terms, the Federal Rules of Civil Procedure govern in "all suits of a civil nature." Fed. R. Civ. P. 1. Consequently, the direct evidence rule is precluded by the plain language of the Federal Rules. Even if some conceivable policy objective were furthered by a direct evidence rule, this Court has made clear that such exceptions can be created only by amending the Federal Rules, not by

---

6 *See Siegert v. Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring); *Id.* at 246 (Marshall, J., joined by Blackmum and Stevens, JJ., dissenting).

judicial fiat. "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 113 S. Ct. at 1163.[7]

2. Respondents have no effective answer to the argument that full use of the existing Federal Rules of Civil Procedure provides ample protection to federal officials without arbitrarily sacrificing meritorious *Bivens* claims. *See* Pet. Br. 38-39; Gov't Am. Br. 20, 29; ACLU Am. Br. 8. Indeed, respondents ignore altogether the latitude district courts have to fashion suitably limited discovery programs under Rules 16, 26(b) and (c) and 37; nor do they address the further safeguards against frivolous claims that exist in Rule 11 and 28 U.S.C. § 1915 (d).[8]

---

7 Nor is there any merit to respondents' argument that qualified immunity "trumps" the Federal Rules because it is a "substantive right." Resp. Br. 28. Respondents are incorrect because they would create an imbalance detrimental to plaintiffs with meritorious constitutional claims. "[I]t is hard to depict a 'right not to be tried' as substantive; it sounds distinctly procedural," and the substantive right "belongs to the plaintiff." *Elliott*, 937 F.2d at 338, 345. In any event, where qualified immunity applies, it confers only a procedural right to avoid trial of insubstantial claims. *Harlow*, 457 U.S. at 816.

8 There is no merit to respondents' proposed "clear and convincing evidence" standard as a threshold evidentiary requirement to be met prior to discovery, on summary judgment, or even at trial. The unprecedented standard respondents advocate has no application to issues of intent. Rule 9(b) of the Federal Rules requires a lower standard for pleading state of mind: "[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). And this Court has held that, "if anything, the difficulty of proving the

A recent en banc decision of the United States Court of Appeals for the Fifth Circuit forcefully confirms that special exceptions to the Federal Rules of Civil Procedure are unnecessary and that the district court "has an array of procedures that will carry the load as far as pleadings can." *Schultea v. Wood*, No. 93-2186, 1995 U.S. App. LEXIS 4673, at *20 (5th Cir. Mar. 9, 1995). In *Schultea v. Wood*, the Fifth Circuit held that courts may employ Rule 7(a) to assure that federal officials are not brought into court on the basis of mere "base allegations" of unlawful motive. "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." *Id.* at **17-18. As the court explained, district courts need not allow any discovery unless plaintiff has supported his claim with "sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts." *Id.* at *20.

The protections contained in the Federal Rules strike the appropriate balance between the legitimate interests of plaintiffs and defendants in *Bivens* cases. In view of the substantial evidence of respondents' pretextual and shifting explanations, violations of regulations, injurious actions and inappropriate influences (*see* Pet. Br. 2-14), petitioner's claim should be permitted to proceed.

---

defendants state of mind supports a *lower* standard of proof." *Herman & MacLean*, 459 U.S. at 390-91 n.30 (emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JERROLD J. GANZFRIED
HOWARD T. ROSENBLATT
Counsel Of Record
ELLEN S. WINTER
KATHLEEN M. GRABER
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

April 1995

(5)

No. 93-2068

FILED
MAR 1 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T. L. PILLARD
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in a *Bivens* case in which unlawful motive is an element of a constitutional claim, a plaintiff must meet a "heightened pleading" standard to survive a motion to dismiss or for summary judgment raising a qualified-immunity defense.

2. Whether a plaintiff in a *Bivens* action in which unlawful motive is an element of a constitutional claim must produce, prior to discovery, "direct" as opposed to circumstantial evidence of unlawful motive in order to avoid dismissal or summary judgment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Summary of argument	9
Argument	11
I. The court of appeals erred in responding to the serious concerns of *Harlow* by requiring petitioner to present direct rather than circumstantial evidence of unconstitutional motive supporting his First Amendment *Bivens* claim	12
A. The direct-evidence rule was designed to give public officials added protection from motive-based damage claims	14
B. The direct-evidence rule conflicts with this Court's precedents	17
II. Plaintiffs should be required to respond to assertions of qualified immunity with heightened specificity in order to facilitate prompt resolution of the qualified-immunity question	20
A. All courts agree that heightened specificity is appropriate to motive-based claims, and the courts are in close accord regarding the precise articulation of the standard	21
B. The specificity requirement facilitates application of qualified immunity as *Harlow* defines it	24
C. The specificity requirement is consistent with the Federal Rules of Civil Procedure	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987)	24, 28
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	29-30

Cases—Continued: Page

Andrews v. *Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991) 22
Babb v. *Dorman*, 33 F.3d 472 (5th Cir. 1994) 22, 23, 26
Barr v. *Matteo*, 360 U.S. 564 (1959) 12
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) .....*passim*
Branch v. *Tunnell*:
937 F.2d 1382 (9th Cir. 1991) 14, 20, 23, 28
14 F.3d 449 (9th Cir.), cert. denied, 114 S. Ct. 2704 (1994) 22, 26
Butz v. *Economou*, 438 U.S. 478 (1978) 1-2, 15, 30
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986)..... 29
Colle v. *Brazos County*, 981 F.2d 237 (5th Cir. 1993) 22, 27
Crawford-El v. *Britton*, 951 F.2d 1314 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 62 (1992) 22
Crutcher v. *Kentucky*, 883 F.2d 502 (6th Cir. 1989) 14
Elliott v. *Perez*, 751 F.2d 1472 (5th Cir. 1985)..... 28, 29
Elliott v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992) 9, 13-14, 18, 20, 22, 23, 27
Estelle v. *Gamble*, 429 U.S. 97 (1976) 16
Farmer v. *Brennan*, 114 S. Ct. 1970 (1994) 18, 25
Gomez v. *Toledo*, 446 U.S. 635 (1980) 27
Gooden v. *Howard County*, 954 F.2d 960 (4th Cir. 1992) 22, 23
Gregoire v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) 12
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 1, 10, 11, 12, 13, 15, 16, 18, 20, 30
Herbert v. *Lando*, 441 U.S. 153 (1979) 17
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985) 16, 22
Holland v. *United States*, 348 U.S. 121 (1954)..... 17, 18
Hunter v. *District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991) 13
Jordan by Jordan v. *Jackson*, 15 F.3d 333 (4th Cir. 1994) 27
Kartseva v. *Department of State*, 37 F.3d 1524 (D.C. Cir. 1994) 13, 21, 23

Cases—Continued: Page

Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993) 10, 21, 26, 27
Martin v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987) 16
Martin v. *Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987) .. 22
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 30
Mendocino Envtl. Ctr. v. *Mendocino County*, 14 F.3d 457 (9th Cir. 1994) 23
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 11, 12
Nuclear Transp. & Storage, Inc. v. *United States*, 890 F.2d 1348 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990) 22
Pell v. *Procunier*, 417 U.S. 817 (1974) 16
Procunier v. *Navarette*, 434 U.S. 555 (1978) 15
Pueblo Neighborhood Health Ctrs., Inc. v. *Losavio*, 847 F.2d 642 (10th Cir. 1988) 22, 23
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 11, 12, 15
Schultea v. *Wood*, 27 F.3d 1112 (1994), reh'g en banc granted, No. 93-2186 (5th Cir. Aug. 26, 1994) 26
Siegert v. *Gilley*:
895 F.2d 797 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991) 8, 14, 16
500 U.S. 226 (1991) 11, 14, 17, 19, 21, 22, 23, 27
Tompkins v. *Vickers*, 26 F.3d 603 (5th Cir. 1994) .. 13, 18, 20, 23, 30
United States Postal Service Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 17
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 17
Washington v. *Davis*, 426 U.S. 229 (1976) 16
Waters v. *Churchill*, 114 S. Ct. 1878 (1994) 16
Whitacre v. *Davey*, 890 F.2d 1168 (D.C. Cir. 1989), cert. denied, 497 U.S. 1038 (1990) 14-15
Wicks v. *Mississippi State Employment Servs.*, 41 F.3d 991 (5th Cir. 1995) 27
Wyatt v. *Cole*, 112 S. Ct. 1827 (1992) 11, 17, 19, 30

Constitution, statutes, regulations, and rules: Page

U.S. Const.:
Amend. I 3, 4, 7, 9, 12, 13
Amend. V 3
Amend. VIII 18
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 3
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2511 3
18 U.S.C. 241 19
18 U.S.C. 242 19
42 U.S.C. 1983 ..... 1, 14, 21, 26
28 C.F.R.:
Section 540.104 7
Sections 540.60-540.65 5
Sections 542.10-542.16 3
Fed. R. Civ. P.:
Rule 8 ..... 10, 20, 21, 25
Rule 8(a)(2) 26
Rule 9(b) 10, 21, 26, 28
Rule 11 29
Rule 11 advisory committee's notes 29
Rule 11(b) 29
Rule 11(c) 29
Rule 12(b)(6) 24, 25
Rule 12(e) 20, 29
Rule 16 29
Rule 16 advisory committee's notes 29
Rule 26 advisory committee's notes 29
Rule 26(b)(2) 29
Rule 26(c) 29
Rule 26(d) 29
Rule 26(g) 29
Rule 37 29
Rule 56(c) 25
Rule 56(f) 25, 28

Miscellaneous:

Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126 (1985) 19

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2068

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The United States has important interests in the law relating to qualified immunity, including the standards at issue in this case. Qualified immunity applies in civil actions against federal personnel in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials under 42 U.S.C. 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 500-

501 (1978). The United States has an interest in protecting government employees from meritless and unduly burdensome litigation that may interfere with their exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

This case is one of approximately 500 *Bivens* cases filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP).[1] The Bureau consists of 79 prisons, six regional offices, and the Central Office in Washington, D.C. The majority of Bureau personnel are line staff, such as Correctional Officers, Correctional Counselors, Case Managers, and Unit Managers. The responsibilities of line staff require close daily contact with the inmate population and call upon the staff to exercise discretion in preserving inmate discipline and providing for the needs of inmates and the safety and security of inmates and staff. The Bureau trains and encourages its line staff to interact frequently with inmates in order to anticipate and resolve conflicts without unnecessary confrontations.

Programming and administrative staff also have frequent, close interaction with inmates. The discipline and other restrictions those officials impose, and the services they provide—including intake and assignment to living quarters, provision of health care, and supervision of educational and work activities—have an important impact on inmates' conditions of confinement. Prison administrators, regional staff, and Central Office staff make policy and management decisions that affect local staff action, and, in turn, the inmates themselves. Administrators also

[1] Claims are also made in this case against respondent Loye W. Miller, Jr., former Director of Public Affairs at the Department of Justice.

make appeal decisions in disciplinary cases and other administrative claims. See generally 28 C.F.R. 542.10-542.16.

Contact between all levels of BOP staff and inmates in the often adversarial environment of incarceration generates numerous allegations by inmates that actions were taken against them for unlawful reasons. The vast majority of these allegations have proven unfounded.[2] The comprehensive control exercised by prison staff over the inmate population also carries with it, however, the risk that staff members may at times abuse their authority and violate inmates' constitutional rights. Careful accommodation is therefore required between preserving the right to redress when constitutional violations occur, and limiting the impact of meritless inmate claims that are costly to litigate, impose substantial burdens on institutional management and individual defendants, and have the cumulative effect of depriving the public of the ability of government officials to make difficult decisions with the appropriate level of confidence.

STATEMENT

1. Petitioner brought this case to challenge what he alleges were adverse actions taken by respondents in retaliation against him for his exercise of speech rights protected by the First Amendment.[3] The district court's

---

[2] In the three years from 1992 through 1994, there was a monetary settlement in approximately 16 of the 1,513 cases against BOP officials that included *Bivens* claims, and two of the dozen such cases that went to trial during that period resulted in a judgment in favor of the plaintiff.

[3] Petitioner also brought a *Bivens* claim of violation of his Fifth Amendment due process rights, and claims against the United States and respondent Quinlan, in his official capacity as BOP Director, under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511. Only the First Amendment *Bivens* claim is before this Court.

decision was rendered in response to respondents' motion for summary judgment. That court was therefore required, as was the court of appeals, to view the evidence in the light most favorable to petitioner. Except where indicated, the following summary of the facts is taken from the court of appeals' opinion (Pet. App. 3a-7a).[4]

The events giving rise to this case began shortly before the November, 1988, presidential election. Petitioner was incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma, serving a 51-year sentence for drug and explosives violations. He was placed in administrative detention on three different occasions, twice before and once after the election. He alleges that those placements were either intended to deny him access to the press or were in retaliation for his exercise of free speech rights. Respondents, on the other hand, maintain that the detentions were motivated by lawful official purposes—to ensure petitioner's safety and in response to charges that petitioner had violated prison rules regarding "third party" telephone calls. Pet. App. 7a.

Several days before the election, petitioner spoke by telephone with journalist Nina Totenberg and claimed that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. Totenberg arranged for petitioner to make an affidavit recounting his version of events, which she showed to high-level members of the Bush/Quayle campaign. Totenberg did not broadcast the story, however, because she could not corroborate it. Pet. App. 3a, 21a-22a; C.A. App. 79.

Other news organizations heard of petitioner's allegations. On November 3, the Thursday before the election, NBC News contacted El Reno officials and requested an

---

[4] The factual record included substantial discovery relating to the non-*Bivens* claims, which was conducted notwithstanding a narrow stay of discovery applied only to the *Bivens* claims. Some of the discovery that petitioner obtained relating to his other claims proved relevant to his First Amendment *Bivens* claim.

in-person interview with petitioner. El Reno officials offered to arrange an interview on November 8, election day, but NBC responded that that would be too late, and threatened to run a "cover-up" story if an earlier interview were not arranged. On Thursday, November 3, the Bureau's Central Office instructed El Reno officials to arrange for an earlier interview, and NBC taped an interview with petitioner on Friday, November 4. NBC ultimately decided not to broadcast the story. Pet. App. 3a, 22a; C.A. App. 12-13, 94.

After the NBC interview, other media organizations sought to interview petitioner. El Reno's Acting Warden suggested that a group interview be set up to make it less burdensome on the institution to handle the volume of inquiries. The Executive Assistant to the El Reno Warden told petitioner on November 4 that he would set up a "press conference" for that evening at 7:00 p.m. Pet. App. 4a, 22a.

On either November 3 or November 4, Bush/Quayle campaign officials learned of petitioner's allegations and a campaign official telephoned the Bureau "for additional information" and learned of the November 4 NBC interview. Pet. App. 3a; C.A. App. 96. The campaign Press Secretary spoke with respondent Loye Miller, the then-Director of Public Affairs at the Department of Justice, and said he was "amazed" that petitioner was to hold a press conference. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." Pet. App. 4a, 26a-27a. However, respondent J. Michael Quinlan, then-Director of the BOP, instructed the El Reno authorities to cancel the press conference because "the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." *Id.* at 4a; C.A. App. 95; see 28 C.F.R. 540.60-540.65. Quinlan asserted that he had not allowed an inmate press conference during his tenure as BOP Director. Pet. App. 4a.

a. *November 4 Detention.* At approximately 11:30 p.m. on November 4, petitioner was placed in administrative detention at Quinlan's direction, pending investigation of allegations that petitioner had told a news reporter that he was in danger. Pet. App. 5a; C.A. App. 67. The administrative detention order by El Reno officials recited that petitioner had "stated to the National news media this [sic] his life is in danger and so is being placed in Administrative Detention for his protection." Pet. App. 5a, 24a; C.A. App. 48. Petitioner contends that he was expressly prohibited from making telephone calls until the afternoon of November 5. Pet. 6; Pet. App. 24a; C.A. App. 74.[5] While petitioner was in detention, the Bush/Quayle campaign Press Secretary again called Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." Pet. App. 5a-6a; C.A. App. 85. According to Miller, however, the Press Secretary "did not try in any way to influence the department's handling of Kimberlin." Pet. App. 6a; C.A. App. 85. Petitioner was released from administrative detention at 7:30 p.m. on Saturday, November 5. Pet. App. 6a, 23a.

b. *November 7 Detention.* After he was released from administrative detention on November 5, petitioner made several telephone calls in order to schedule a group telephone interview with reporters, who planned to gather for that purpose at the Mayflower Hotel in Washington, D.C., on the morning of Monday, November 7. Pet. App. 23a. At approximately 9:00 a.m. on November 7, before the

---

[5] However, in responses to requests for admissions filed in 1993, after the issuance of the district court order denying respondents' motion to dismiss or for summary judgment, petitioner admitted that he was briefly removed from his detention cell on the afternoon of November 5 in order to telephone Nina Totenberg. Plaintiff's Responses to Defendants' Request For Admissions, Question 1 (Feb. 16, 1993).

time scheduled for the group telephone interview, petitioner was again placed in administrative detention, where he remained for seven days. *Ibid.*; C.A. App. 75. Petitioner contends that he was not permitted to make telephone calls during this time, except to his lawyer. Pet. App. 23a; C.A. App. 75.[6] The reason given for that detention was violation of a prison regulation prohibiting inmates from making third-party telephone calls, *i.e.*, calls made to one party, and then electronically transferred by that party to a third party. Pet. App. 6a (citing 28 C.F.R. 540.104). On November 14, after an administrative hearing at which petitioner was found guilty of violating the telephone regulation, he was released from administrative detention. Pet. App. 6a, 25a-26a.

c. *December 22 Detention.* Petitioner was again placed in administrative detention on December 22, the day after he held two telephone interviews, and a few days after news stories appeared recounting his conflicts with prison officials. The reason given was violation of the prohibition on third-party telephone calls. Petitioner was released from detention on December 23, and was found not guilty of the violation because there was "no specific evidence that [he] intentionally placed a conference/third-party call." Pet. App. 6a-7a.

2. On August 15, 1990, petitioner filed suit including, *inter alia*, a *Bivens* claim that respondents had placed him in detention in violation of his First Amendment rights. Respondents promptly moved to dismiss or for summary judgment on grounds of qualified immunity. The district court stayed discovery relating to the *Bivens* claims pend-

---

[6] Although petitioner contends that he was denied communication with the news media, his subsequent responses to requests for admissions reflect that, "at some point during his detention, prison officials briefly removed [petitioner] from his cell and brought him to the office of [the Executive Assistant to the El Reno Warden], where he was interviewed on camera" by a member of the news media. Plaintiff's Responses to Defendants' Request For Admissions, Question 17 (Feb. 16, 1993).

ing resolution of the qualified-immunity question. Pet. App. 2a; see C.A. App. 3 (referring to order dated 11/26/90).[7]

On August 6, 1991, the district court held that respondents were not entitled to qualified immunity. Pet. App. 44a-62a. "[I]f [respondents] were motivated by a purpose to keep [petitioner] from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attach[] to their actions." *Id.* at 48a. The court held that a heightened pleading standard applicable to *Bivens* claims required "allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial)." *Id.* at 52a. Petitioner, in the court's view, met that standard. *Id.* at 53a-56a. Reasoning that the decision of the District of Columbia Circuit in *Siegert* v. *Gilley*, 895 F.2d 797 (1990), aff'd on other grounds, 500 U.S. 226 (1991), was "susceptible of more than one interpretation," the district court did not apply *Siegert*'s "direct evidence" rule. Pet. App. 50a. It held that *Siegert* should not be read to require a *Bivens* plaintiff to plead direct evidence, because "circumstantial evidence is intrinsically no different than direct evidence." *Id.* at 52a. Having denied the qualified-immunity motion, the court lifted the discovery stay. *Id.* at 63a.

3. Respondents took an interlocutory appeal, and the court of appeals reversed. Pet. App. 1a-43a. In a divided decision, the court held that an elevated standard of pleading and proof applies where a plaintiff "sues government officials and alleges unconstitutional motive." *Id.* at 8a. That standard requires "pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for

---

[7] As noted, see note 4, *supra*, discovery relating to the non-*Bivens* claims was not, however, stayed.

summary judgment." *Id.* at 9a.[8] Petitioner failed to meet that standard because he did not proffer "*direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence." *Id.* at 12a-13a. Petitioner "relie[d] only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by [respondents]." *Id.* at 17a.[9] The court of appeals denied petitioner's suggestion for rehearing en banc. *Id.* at 64a-75a.

SUMMARY OF ARGUMENT

I. The decision of the District of Columbia Circuit dismissing petitioner's First Amendment claim for want of direct, as opposed to circumstantial, evidence of retaliatory motive is in error and should be reversed. The District of Columbia Circuit adopted the direct-evidence rule in order to prevent baseless allegations of unconstitutional motive from defeating a qualified-immunity defense, and thereby to protect public employees' ability to carry out the traditional functions of government. The direct-evidence rule, however, is an inappropriate means to achieve that objective.

The District of Columbia Circuit is alone in requiring direct evidence of motive. The direct-evidence rule conflicts with decisions of this Court establishing that circumstantial evidence is intrinsically no less probative than

---

[8] The court noted that, although other circuits had "refrain[ed] from adopting the direct/circumstantial distinction," most circuits had adopted some form of heightened pleading standard. Pet. App. 9a-10a & n.10.

[9] "[A]s [applied] here, at the summary judgment stage," the court stated, "the expression 'heightened pleading' is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading." Pet. App. 9a n.8 (citing *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992).

direct evidence, and that proof of intent may be made with either or both types of evidence. Moreover, the direct-evidence rule does not facilitate the application of qualified immunity as *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), defines it, and can weed out even strong claims in an effort to bar insubstantial ones.

II. This Court should adopt a "heightened pleading" standard in qualified-immunity cases in which unconstitutional motive is alleged. Under that standard, once a defendant asserts a qualified-immunity defense, the plaintiff must allege specific and concrete facts showing why the defense cannot be sustained. Additional detail is required in cases in which a qualified-immunity defense is raised in order to permit district courts to decide at the outset, before discovery, whether the defense applies so that the case should be dismissed.

A requirement of heightened specificity has a strong basis in precedent. Every circuit that has addressed the issue has adopted such a requirement, and four Justices of this Court have also endorsed a requirement of heightened specificity as an appropriate implementation of qualified immunity. The courts are in close agreement regarding the verbal formulation of the standard, and they support requiring the degree of heightened specificity we urge. Unlike the heightened-pleading rule this Court rejected for civil rights claims not subject to a qualified-immunity defense, a requirement of greater specificity from plaintiffs in response to an assertion of a qualified-immunity defense does not conflict with Federal Rules of Civil Procedure 8 and 9(b). Cf. *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

ARGUMENT

This Court has allowed limited forms of money damage actions against government officials in their personal capacities for actions taken under color of federal law, but the Court at the same time has been acutely aware of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974). The need to provide government officials protection from personal-capacity suits stems from the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240. See also *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1833 (1992).

The qualified immunity provided by *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982), is intended to preserve the ability of government officials to serve the public good and to ensure that able candidates for government office will not be deterred by the threat of damage suits from entering public service. *Wyatt*, 112 S. Ct. at 1833. Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions." *Ibid.* The immunity is intended to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991), *i.e.*, the costs, burdens, and distractions of the suit itself. See *Wyatt*, 112 S. Ct. at 1832-1833; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity seeks to avoid, wherever possible, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*,

472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, qualified immunity is concerned not only with protecting public officials from personal *liability*; it also aims to ensure "the dismissal of insubstantial lawsuits *without trial*." *Harlow*, 457 U.S. at 814 (emphasis added).

Recognizing the need to protect against these dangers, this Court's "decisions consistently have held that government officials are entitled to some form of immunity from suits for damages." *Harlow*, 457 U.S. at 806. As this Court has explained:

> Implicit in the idea that officials have some immunity —absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to asume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer, 416 U.S. at 242. A government official's immunity from suit is not "a badge or emolument of exalted office," but rather is grounded on principles of public policy—"a policy designed to aid in the effective functioning of government." *Ibid.* (quoting *Barr* v. *Matteo*, 360 U.S. 564, 572-573 (1959) (opinion of Harlan, J.)). To deny such immunity would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950). An effective qualified-immunity defense requires rules that will not permit frivolous or plainly non-meritorious suits to deter officials from confident exercise of their lawful discretion.

I. THE COURT OF APPEALS ERRED IN RESPONDING TO THE SERIOUS CONCERNS OF *HARLOW* BY REQUIRING PETITIONER TO PRESENT DIRECT RATHER THAN CIRCUMSTANTIAL EVIDENCE OF UNCONSTITUTIONAL MOTIVE SUPPORTING HIS FIRST AMENDMENT *BIVENS* CLAIM

In *Bivens* actions in which the constitutional violation requires proof of unlawful intent, the District of Columbia

Circuit--in an attempt to respond to concerns articulated in *Harlow*—applies two doctrines to protect government officials from baseless or insubstantial claims. First, in all cases involving qualified immunity, the District of Columbia Circuit (and most other circuits, see p. 21 & n.22, *infra*) requires "heightened pleading," whereby in response to a defense of qualified immunity, the plaintiff must "plead the facts surrounding the alleged violation with sufficient 'detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial.' " *Kartseva* v. *Department of State*, 37 F.3d 1524, 1530-1531 (D.C. Cir. 1994) (quoting *Hunter* v. *District of Columbia*, 943 F.2d 69, 75 (D.C. Cir. 1991)). In addition, where the claim turns on an allegation of improper motive, the District of Columbia Circuit requires that those facts be supported by "specific *direct* evidence" of such motive. Pet. App. 9a.[10] Only then is the plaintiff permitted to embark on discovery. In this case, the court of appeals considered only the second of those tests and held that, because petitioner's First Amendment claim was unsupported by direct evidence of unconstitutional retaliatory motive, respondents are entitled to judgment in their favor on that claim. *Ibid.* In our view, the requirement of "heightened pleading" is appropriate—indeed essential—but the direct-evidence rule is not.

This Court has repeatedly recognized the importance of protecting public officials against the burdens of litigating baseless claims, and the District of Columbia Circuit sought to advance that goal in adopting the direct-evidence rule. The rule, however, does not properly respond to that concern. It has been rejected by every other court of appeals that has considered it[11] and has been

---

[10] This requirement applies to all constitutional claims of which any subjective state of mind—such as intent, motive, or purpose—is a required element of proof. This brief uses interchangeably those various terms for state of mind, and no material difference is intended.

[11] See *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied,

called into question by four Justices of this Court [12] and by six of the District of Columbia Circuit judges that considered the rule in this case.[13] This Court should reverse the judgment of the court of appeals and remand petitioner's *Bivens* claim for further proceedings.

A. The Direct-Evidence Rule Was Designed To Give Public Officials Added Protection From Motive-Based Damage Claims

The District of Columbia Circuit's direct-evidence rule applies to *Bivens* or Section 1983 damage claims against government officials in their individual capacities in which subjective state of mind is an element of the claim. Under the rule, a complaint in such a case that does not, before discovery commences, identify direct (as opposed to circumstantial) evidence supporting the plaintiff's allegations of unlawful motive cannot survive a defendant's motion to dismiss based on qualified immunity. Pet. App. 9a & n.9; *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990) (intent "must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent"), aff'd on other grounds, 500 U.S. 226 (1991). Similarly, the plaintiff must produce such direct evidence in order successfully to oppose a pre-discovery motion for summary judgment. Pet. App. 9a & n.8; *Whitacre* v. *Davey*, 890

---

502 U.S. 1074, 1121 (1992); *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (9th Cir. 1991); *Crutcher* v. *Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

[12] See *Siegert*, 500 U.S. at 235-236 (Kennedy, J., concurring); *id.* at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

[13] Pet. App. 17a-19a (Williams, J., concurring); *id.* at 30a (Edwards, J., dissenting); *id.* at 65a (Williams, J., joined by Silberman and Buckley, JJ., concurring in denial of rehearing en banc) (stating that "[t]he imperfections of our 'direct evidence' rule are plain to see"); *id.* at 67a (Silberman, J., concurring in denial of rehearing en banc) ("Those who criticize this circuit's direct versus circumstantial evidence distinction * * * have a logical point."); *id.* at 74a-75a (Edwards, J., joined by Wald, J., and Mikva, C.J., dissenting from denial of rehearing en banc).

F.2d 1168, 1171 & n.4 (D.C. Cir. 1989) (emphasizing that, in order to defeat a motion for summary judgment based on qualified immunity, a plaintiff must come forward with direct evidence before obtaining any discovery), cert. denied, 497 U.S. 1038 (1990). Direct evidence is also required where, as in this case, a summary-judgment motion was filed after some discovery was taken. Pet. App. 12a-13a, 17a.

In adopting the direct-evidence rule, the District of Columbia Circuit reasoned that, under *Harlow*, inquiries regarding a defendant official's subjective intent may conflict with the goals of qualified immunity to dispose promptly of insubstantial claims. Before *Harlow*, public officials were entitled to qualified immunity from suit when they had "reasonable grounds for the belief [in the legality of their action] formed at the time and in light of all the circumstances, *coupled with good-faith belief*." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (emphasis added) (quoting *Scheuer*, 416 U.S. at 247-248). The Court in *Harlow* observed, however, that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [v. *Economou*, 438 U.S. 478 (1978)], that insubstantial claims should not proceed to trial," because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." *Harlow*, 457 U.S. at 815-816. As long as determination of the official's state of mind was an element of the qualified-immunity defense, analysis whether that immunity was available required "[j]udicial inquiry into subjective motivation," *id.* at 817, often increasing rather than reducing a defendant's discovery and trial burdens. *Harlow* accordingly held that the availability of qualified immunity should turn not on the official's subjective "good faith," but on the objective, legal question whether the right asserted by the plaintiff was clearly established at the time of the action in question. *Id.* at 818.

Proof of state of mind is also, however, an element of many constitutional claims, including claims of unconsti-

tutional discrimination, see *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (requirement of proof of discriminatory purpose), cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) (deliberate indifference), and, as in this case, punishment allegedly based on the content of protected speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). Thus, although a state-of-mind inquiry is no longer part of the qualified-immunity *defense* under *Harlow*, an objectively based immunity defense cannot prevent plaintiffs from pleading unconstitutional motive as an element of their own *claims*.[14] Since the law barring intentional violations of rights by government actors is likely to be clearly established,[15] the District of Columbia Circuit recognized "the danger that plaintiffs might allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801 (citing *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)).

---

[14] Like all other circuits that have considered the question, the District of Columbia Circuit considered and rejected the notion that *Harlow*'s statement that "bare allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad-reaching discovery," 457 U.S. at 817-818, rendered defendants completely immune from intent-based constitutional damage claims. The court thus expressly declined to adopt an interpretation of *Harlow* that "would insulate officials from liability in all cases in which the substantive prescription makes the official's state of mind an essential component of the alleged constitutional violation." *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1433 (D.C. Cir. 1987); see also *Siegert*, 895 F.2d at 801 ("[I]t is by no means clear that the Supreme Court intended this expansive language to preclude *any* inquiry into subjective motivation.").

[15] For example, government officials may, in general, discipline their subordinates for noncompliance with valid work requirements. Such otherwise constitutional actions, however, become unconstitutional when taken because of a subordinate's political or religious views. See *Waters* v. *Churchill*, 114 S. Ct. 1878, 1885 (1994) (plurality opinion).

B. The Direct-Evidence Rule Conflicts With This Court's Precedents

The risks identified by the District of Columbia Circuit are serious. But the appropriate antidote—as every other court that has considered the issue has concluded—is *not* to draw an artificial distinction between direct and circumstantial evidence. As Justice Kennedy recognized in his concurring opinion in *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991),[16] the District of Columbia Circuit's direct-evidence rule conflicts with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954), which held that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." *Id.* at 140.[17] That principle is well established in the law governing proof of state of mind,[18] and it was a factor in the Fifth

---

[16] See also *Siegert*, 500 U.S. at 246 (Marshall, J., dissenting, joined by Blackmun and Stevens, JJ.) ("the Court of Appeals erred in holding that a district court may not permit limited discovery in a case involving unconstitutional motive unless the plaintiff proffers *direct* evidence of the unconstitutional motive").

[17] The *Holland* Court stated that, "[a]dmittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." 348 U.S. at 140. See also *Wyatt*, 112 S. Ct. at 1837 (Kennedy, J., joined by Scalia, J., concurring) (the question of intent "is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case").

[18] See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and direct evidence is not required); *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. * * * [T]he District Court should not have required [the plaintiff] to submit direct evidence of discriminatory intent."); *Herbert* v. *Lando*, 441 U.S. 153, 165 & n.15 (1979) ("courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or

and Seventh Circuits' decisions to reject the direct-evidence rule, see *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994) ("Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent."); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("we agree with Justice Kennedy['s opinion concurring in the judgment in *Siegert*] that there is no principled difference between direct and circumstantial evidence"), cert. denied, 502 U.S. 1074, 1121 (1992). An opposing party's state of mind is, by its nature, difficult to prove, and is most often proved by circumstantial evidence. Thus, we continue to adhere to the position we took in *Siegert* that the direct-evidence rule would conflict with *Holland*. Br. for the Resp. at 20 n.13 (No. 90-96).

Moreover, the direct-evidence rule does not facilitate application of qualified immunity as *Harlow* defines it. Unlike requirements of heightened specificity, discussed in Point II below, the direct-evidence rule does not aid the court in determining whether the right plaintiff asserts was clearly established. Indeed, because motive-based claims ordinarily (although certainly not always) *do* rest on clearly established law, the direct-evidence rule provides immunity notwithstanding *Harlow*'s contemplation that, where governing law is clearly established, "the immunity defense ordinarily should fail." 457 U.S. at 818-819. The direct-evidence rule thus creates a wholly new "immunity" based not on the reasonableness of the official defendant's conduct, but on whether the plaintiff has, fortuitously, been able to secure direct, rather than circumstantial, evidence of unconstitutional motive or purpose.

As Judge Williams correctly observed, the distinction between direct and circumstantial evidence also is "completely arbitrary and unrelated to the strength of the plaintiff's case." Pet. App. 18a. The direct-evidence rule

---

enhance damages"); see also *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1984 (1994) (prisoner asserting Eighth Amendment claim of prison officials' deliberate indifference to known risks "may establish respondents' awareness by reliance on any relevant evidence").

arbitrarily blocks even strong claims in the salutary effort to eliminate unfounded ones.[19] Qualified immunity is intended to "strike[] a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 112 S. Ct. at 1833. The direct-evidence rule does not strike that balance. Neither the severity of the wrong at issue, nor the strength of the potential proof, necessarily correlates with whether evidence is direct or circumstantial. The most egregious wrongs, including those that violate criminal law, are typically proved by circumstantial evidence in our legal system. Indeed, even the strictest standard of proof imposed by our law—the beyond-a-reasonable-doubt standard applicable in criminal cases—does not require direct evidence for its satisfaction.[20]

Requiring direct evidence of motive before any discovery may be had is especially inappropriate in view of the fact that "evidence of such intent is peculiarly within the control of the defendant." *Siegert*, 500 U.S. at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissent-

---

[19] *Harlow*'s qualified-immunity standard properly bars recovery for actions that a reasonable public official cannot fairly be presumed to know are unconstitutional. That is quite different from excusing purposeful discrimination, deliberate disregard of prisoners' health or safety, retaliation for the content of protected speech, or other unconstitutional conduct taken with an unlawful subjective motive, simply because the plaintiff lacks direct evidence of such an intent even before discovery has taken place. See Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 141 (1985) (concluding that qualified immunity should not be construed to "preclude effective redress for those constitutional violations for which victims are most in need of compensation and for which officials are least deserving of immunity"—*i.e.*, intent-based constitutional claims).

[20] It would, for example, be anomalous to prevent, based on absence of direct evidence, a victim of a criminal violation of federal civil rights laws, see 18 U.S.C. 241, 242, from litigating a claim for damages against public officials convicted of that criminal violation on the basis of circumstantial evidence.

ing). As the Fifth Circuit, for example, observed in *Tompkins*, 26 F.3d at 609, "direct evidence of an improper motive is usually difficult, if not impossible, to obtain. Thus, requiring direct evidence would effectively insulate from suit defendants who deny an improper motive in cases such as this." The Ninth Circuit, too, held that "[b]ecause evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal." *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (1991). The Seventh Circuit similarly observed that "[r]equiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed." *Elliott* v. *Thomas*, 937 F.2d at 345. This Court, in accord with the weight of the decisional law in this area, should reject the direct-evidence rule.

II. PLAINTIFFS SHOULD BE REQUIRED TO RESPOND TO ASSERTIONS OF QUALIFIED IMMUNITY WITH HEIGHTENED SPECIFICITY IN ORDER TO FACILITATE PROMPT RESOLUTION OF THE QUALIFIED-IMMUNITY QUESTION

The requirement that a plaintiff respond to a qualified-immunity defense with a *factually specific* statement of the claim that a clear right has been violated is, in our view, an important tool in implementing the mandate of *Harlow* that, until the "threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. The purpose of the additional detail in allegations is to permit the district courts to determine whether claims should be dismissed on qualified-immunity grounds. The requirement of heightened specificity facilitates the determination whether the relevant law, as it related to the actual circumstances a particular public official faced when he or she engaged in challenged conduct, was clearly established. Because the rule does not actually affect the standard of pleading under Federal Rule of Civil Procedure 8, but operates like the Motion for a More Definite Statement authorized by Rule 12(e), it is consistent with

the Rules and with this Court's decision in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

A. All Courts Agree That Heightened Specificity Is Appropriate To Motive-Based Claims, And The Courts Are In Close Accord Regarding The Precise Articulation Of The Standard

In our view, *Bivens* and Section 1983 actions, like all other actions not covered by Federal Rule of Civil Procedure 9(b), may be initiated by pleading that satisfies the standard set forth in Rule 8. Once a defendant raises a defense of qualified immunity, however, additional specificity is required. We believe that the appropriate standard is the one we proposed in our brief to this Court in *Siegert* v. *Gilley*, which is fairly encapsulated as follows:

> A plaintiff may not rely solely on subjective allegations. Attenuated inferential and circumstantial allegations, or otherwise conclusory allegations are not sufficient. Rather, a plaintiff must allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of respondent's conduct.

See Br. for the Resp. at 20 n.13, 26 (No. 90-96). The four Justices who discussed the issue in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), agreed that courts may properly require additional specificity of allegations in qualified-immunity cases.[21] All the circuits that have considered the issue have held that a requirement of "heightened pleading" is appropriate in qualified-immunity cases.[22]

---

[21] 500 U.S. at 236 (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal."); *id.* at 246 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting) ("In my view, a plaintiff pleading a *Bivens* claim that requires proof of the defendant's intent should be afforded such discovery whenever the plaintiff has gone beyond bare, conclusory allegations of unconstitutional purpose.").

[22] *District of Columbia Circuit: Kartseva*, 37 F.3d at 1531 (a plaintiff must "plead the facts surrounding the alleged violation

Our verbal formulation of the standard is in close accord with the formulations used by the courts of appeals and by those Justices in *Siegert* who addressed the need for a standard of heightened specificity.

---

with sufficient 'detail[] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial' over a qualified immunity defense"); *Hobson* v. *Wilson*, 737 F.2d at 29 (allegations must be "sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds"); *Martin* v. *Malhoyt*, 830 F.2d 237, 254 (1987) (relying on *Hobson* to hold that a plaintiff must "specify the 'clearly established' rights they allege to have been violated with 'sufficient[] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response' "); *Crawford-El* v. *Britton*, 951 F.2d 1314, 1317 (1991) (following *Hobson*), cert. denied, 113 S. Ct. 62 (1992); *Andrews* v. *Wilkins*, 934 F.2d 1267, 1269-1270 (1991) (same).

Other Circuits: See, *e.g.*, *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (en banc) (requiring that the plaintiff "plead specific facts in a nonconclusory fashion"); *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (requiring that a complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Colle* v. *Brazos County*, 981 F.2d 237, 246 (5th Cir. 1993) ("when government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense"); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) (where qualified immunity is a potential defense, "greater specificity should be required in order to support the contention that a plea of immunity cannot be sustained"), cert. denied, 494 U.S. 1079 (1990); *Elliott* v. *Thomas*, 937 F.2d at 344-345 (requiring the plaintiff "to produce 'specific, nonconclusory factual allegations * * * or face dismissal' ") (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)); *Branch* v. *Tunnell* (*Branch II*), 14 F.3d 449, 452 (9th Cir.) ("The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity."), cert. denied, 114 S. Ct. 2704 (1994); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) ("[P]laintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive.").

Courts have adopted "heightened pleading" in response to the same risks that motivated the District of Columbia Circuit to adopt the direct-evidence rule.[23] Judge Easterbrook, for example, in a case in which a discharged public employee sought discovery into her former employers' allegedly retaliatory motive, explained:

> [Plaintiff] wants discovery and a trial to probe the defendants' mental processes * * *. Yet *Harlow* eliminated the subjective component from official immunity (formerly "good faith immunity", a telling phrase) because searching for intent and other components of knowledge blocks the use of immunity as a shortcut to decision. Official immunity creates a "right not to be tried"; yet if by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, the promise of a "right not to be tried" is a hoax.

Elliott v. *Thomas*, 937 F.2d at 344 (citations omitted). The Seventh Circuit responded to this "conundrum" by embracing the standard favored by Justice Kennedy, concurring in *Siegert* v. *Gilley*, that would require "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal." 937 F.2d at 344-345 (quoting 500 U.S. at 236).[24]

---

[23] See *Tompkins*, 26 F.3d at 608; *Elliott* v. *Thomas*, 937 F.2d at 344; *Branch I*, 937 F.2d at 1385.

[24] There is a conflict among the circuits as to whether the requirement of additional specificity applies to all claims to which qualified immunity is raised as a defense, or only to motive-based claims. Compare *Kartseva*, 37 F.3d at 1530-1531 (D.C. Cir.) (heightened pleading not restricted to motive-based claims) and *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (same) with *Mendocino Envtl. Ctr.* v. *Mendocino County*, 14 F.3d 457, 462 (9th Cir. 1994) (heightened pleading applicable only to motive-based claims), *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (same), *Elliott* v. *Thomas*, 937 F.2d at 344-345 (7th Cir.) (same) and *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 649 (10th Cir.) (same). The question presented in this case asks only about the propriety of heightened pleading of motive-based claims. Because motive is an element of the constitutional claim in this case, and the circuits are in agreement that the heightened standard applies, at a mini-

B. The Specificity Requirement Facilitates Application Of Qualified Immunity As *Harlow* Defines It

Plaintiffs are required to allege their claims with heightened specificity in qualified-immunity cases in order to permit a determination by the court as to whether, under the factual circumstances, the relevant law was clearly established at the time of the alleged violation so as to defeat the defendant official's immunity. The level of specificity needed for the immunity determination is indicated by this Court's decision in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Under *Creighton*, whether challenged action violated clearly established law at the time it was taken "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. A plaintiff cannot premise liability on a claim of "violation of extremely abstract rights." *Ibid.* The *Creighton* court explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Ibid.

In the absence of a requirement of heightened specificity in qualified-immunity cases, a complaint that can withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and that in conclusory form asserts

---

mum, to such claims, this case does not require the Court to decide whether the requirement of heightened specificity also applies to non-motive-based claims. In our view, however, the rationale supporting heightened specificity—the need to apply the qualified-immunity defense at the earliest feasible stage—is equally applicable to all claims to which qualified immunity is a defense.

a violation of a right that was clearly established at a general level, could open the door to discovery despite the existence of a valid qualified-immunity defense. That is because a complaint may be adequate under Rule 8, but not describe the nature of the right asserted with sufficient specificity to permit the qualified-immunity inquiry that *Creighton* requires. The courts of appeals have thus uniformly held that it is appropriate, where a qualified-immunity defense is raised, to elicit greater specificity from the plaintiff before discovery. They have done so to ensure that there will be a full opportunity to test whether the *allegations* state a violation of a clearly established right *before* discovery is allowed to unearth evidence to substantiate those allegations. In sum, properly construed, the heightened-specificity rule requires a plaintiff to come forward with detailed factual allegations, which can then be tested as a matter of law under Rule 12(b)(6) before the defendant files a motion for summary judgment under Rule 56(c), because a summary-judgment motion—*i.e.*, a dispositive motion supported by evidentiary material—requires an evidentiary response, and may thus prematurely trigger the plaintiff's demand for discovery.[25] The heightened-specificity requirement thus ensures that cases not proceed to discovery when they can be dismissed on immunity grounds.[26]

---

[25] A defendant may move for summary judgment before discovery commences, but ordinarily, where one party moves for summary judgment and the other party has not yet had adequate (or any) opportunity for discovery, the nonmoving party is entitled to an opportunity to take discovery before filing an opposition to the motion. See Fed. R. Civ. P. 56(f); see also, *e.g.*, *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1984-1986 (1994) (discussing need for remand of deliberate-indifference claim in view of district court's erroneous denial of Rule 56(f) motion). Thus, in the absence of a rule requiring added specificity, a risk remains that a plaintiff who files a pleading alleging a clearly established right in only general terms may proceed directly to discovery, and only face the qualified-immunity issue again at the summary-judgment stage.

[26] Even if the plaintiff satisfies the heightened specificity standard, however, courts must remain sensitive to concerns about the need to limit the burden of unwarranted litigation in ruling on

C. The Specificity Requirement Is Consistent With The Federal Rules Of Civil Procedure

The requirement of heightened specificity in response to a qualified-immunity defense, unlike the heightened pleading standard that some circuits had applied to civil rights claims generally, see *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, *supra*, is fully consistent with the Federal Rules of Civil Procedure. The Court in *Leatherman* unanimously rejected a judicially fashioned requirement of heightened pleading of civil rights claims. Because Federal Rule of Civil Procedure 9(b) imposes a requirement of pleading with heightened particularity only in two specified contexts—claims of fraud or mistake—and does not similarly impose such a requirement on claims of municipal liability under 42 U.S.C. 1983, *Leatherman* held that Section 1983 claims are governed by the Rule 8(a)(2) regime of "notice pleading." 113 S. Ct. at 1163. *Leatherman* expressly reserved the question whether the same logic would apply where qualified immunity may be a defense. *Id.* at 1162 (because municipalities enjoy no immunity from suit, "[w]e * * * have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials").[27]

---

whether evidence presented is sufficient to withstand a defendant's motion for summary judgment on the issue of motive. It may be appropriate to impose additional burdens on plaintiffs at the summary-judgment stage, other than the direct-evidence rule, to address the concerns that prompted the District of Columbia Circuit to embrace that rule. Such alternatives are for the lower courts to explore in this or similar cases.

[27] Several courts since *Leatherman* have relied on this Court's reservation of the issue and have continued to adhere to standards of heightened pleading in the qualified-immunity context. See, *e.g.*, *Babb*, 33 F.3d at 477 (continuing, in light of *Leatherman*, to require that complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Schultea* v. *Wood*, 27 F.3d 1112, 1115 n.2 (1994) (same), reh'g en banc granted, No. 93-2186 (5th Cir. Aug. 26, 1994); *Branch II*, 14 F.3d at 452, 455-457 (adhering after

The *Leatherman* rationale does not apply to the requirement of heightened specificity in the qualified-immunity context, because in that context it is not accurately described as a "pleading" requirement. Qualified immunity is an affirmative defense "that must be pleaded by a defendant official." *Siegert*, 500 U.S. at 231; see *Gomez* v. *Toledo*, 446 U.S. 635 (1980). As Judge Easterbrook explained in *Elliott* v. *Thomas*, "[a] possibility that the defendants will claim immunity does not require the plaintiff to anticipate and plead around that defense." 937 F.2d at 345.[28] Rather, once the defense is raised, plaintiff's allegations must be sufficiently specific to overcome that defense before plaintiff obtains discovery.[29] The fact

---

Leatherman to requirement set forth in *Branch I* that the "complaint must contain nonconclusory allegations" of defendant's scienter); Pet. App. 9a n.9; *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994) (distinguishing in dictum the pleading question in qualified-immunity cases from the claim of municipal liability there at issue).

[28] In practice, the specificity requirement may shape plaintiffs' initial pleadings, since plaintiffs will have good reason to expect that a qualified-immunity defense will be raised and choose to make their pleadings more specific at the outset in an effort to eliminate a need to amend or supplement them later. Some courts, however, do appear to require the plaintiff to anticipate and plead around the defense of qualified immunity. See, *e.g.*, *Colle* v. *Brazos County*, 981 F.2d at 246 ("when government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense"). As long as those courts allow a plaintiff whose initial complaint would fail the heightened standard "the opportunity to amend or supplement the pleadings freely, so that he may state his best case," *Wicks* v. *Mississippi State Employment Servs.*, 41 F.3d 991, 997 (5th Cir. 1995), their heightened pleading requirement is functionally indistinguishable from requiring specificity only in response to a properly raised immunity defense. The better practice, however, is not to require specificity in advance of an assertion of qualified immunity.

[29] In certain cases, some discovery may be needed before a qualified-immunity determination can be made. If a plaintiff specifically alleges conduct that a reasonable officer would not have believed lawful under the state of the law at that time, but defendant's evidence reveals different conduct (consistent with

that the requirement arises only in response to an assertion of a qualified-immunity defense responds to the problem that Judge Patrick Higginbotham anticipated when, in light of the limited scope of Rule 9(b), he questioned whether the Fifth Circuit's "heightened pleading" requirement was authorized even as applied in a qualified-immunity case. *Elliott* v. *Perez*, 751 F.2d 1472, 1483 (1985) (Higginbotham, J., concurring specially).

Because the heightened-specificity standard does not require a defendant to present any evidence in support of a prediscovery qualified-immunity motion, however, it is also not an articulation of the burden of proof. The efficiency sought by the heightened-specificity requirement depends on the court's ability to make the qualified-immunity determination *without* reliance on evidence from the defendant. When the defendant points to evidence in presenting an immunity defense, the plaintiff may claim an entitlement to discovery before the motion is adjudicated (see Fed. R. Civ. P. 56(f); note 25, *supra*)—threatening to impose the very burdens the "heightened pleading" rule seeks to avoid. Ensuring defendants and courts an opportunity to seek additional specificity of allegations from the *plaintiff before* any evidence is proffered helps to ensure that an early, detailed qualified-immunity inquiry is made on a motion to dismiss before any discovery commences.

The timing and function of the specificity requirement in qualified-immunity cases is closely akin to that of the

---

clearly established law), "discovery may be necessary" to allow the plaintiff an opportunity to challenge the defendant's evidence before a motion for summary judgment on qualified-immunity grounds can be resolved. *Anderson* v. *Creighton*, 483 U.S. at 646 n.6; see also *Branch I*, 937 F.2d at 1387 (relying on *Anderson* to hold that, once a plaintiff has "met th[e] threshold requirement" of setting forth his claim with specificity, but the defendants maintain their immunity defense, "the district court may, if it believes discovery is warranted, allow the plaintiff to engage in narrowly tailored discovery, supervising the discovery process to avoid imposing unnecessary burdens on the defendants").

Motion for a More Definite Statement provided for by Federal Rule of Civil Procedure 12(e).[30] Cf. *Elliott* v. *Perez*, 751 F.2d at 1482 (referring to availability of sua sponte Rule 12(e) motions for a more definite statement to assist in controlling cases involving potential qualified-immunity defenses). Under the heightened-specificity rule, a plaintiff met with a defendant's assertion of qualified immunity must, if plaintiff's claims have not already been pleaded with adequate specificity, make allegations sufficiently definite to permit determination of whether a violation of a clearly established right has been alleged. The fact that a similar procedure may be achieved through Rule 12(e) highlights the consistency of the heightened-specificity requirement with the Federal Rules of Civil Procedure.[31]

---

[30] Rule 12(e) states, in relevant part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

[31] The heightened specificity standard augments the operation of several provisions of the Federal Rules of Civil Procedure addressing pleading and discovery, which have been strengthened in recent years in response to the need to deter groundless or frivolous litigation without unnecessarily chilling meritorious claims. See, *e.g.*, Fed. R. Civ. P. 11(b) (requiring proper purpose and evidentiary and legal grounds for filing), 11(c) (authorizing sanctions for noncompliance), 16 (calling for pretrial conference to expedite disposition of action, facilitate judicial management, and discourage wasteful practices), 26(b)(2) (discovery limitations), 26(c) (protective orders), 26(d) (timing and sequence of discovery), 26(g) (signing of discovery requests), and 37 (sanctions); see also *Elliott* v. *Perez*, 751 F.2d at 1480-1482 (stressing importance of Rules 11 and 16 in qualified-immunity cases); see generally Fed. R. Civ. P. 11, 16, 26, advisory committee's notes. In addition, summary-judgment procedures and standards have been clarified in this Court's decisions in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T. L. PILLARD
Assistant to the Solicitor General

MARCH 1995

(1986), and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

Those post-*Harlow* developments help prevent factually unsupported claims from going to trial, and thus serve the purposes of qualified immunity. See *Wyatt*, 112 S. Ct. at 1835 (Kennedy, J., joined by Scalia, J., concurring); see also *Tompkins*, 26 F.3d at 608. They give added bite to this Court's expectation that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Harlow*, 457 U.S. at 808 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)).

Moreover, the position we advocate in our brief *amicus curiae* in *Johnson* v. *Jones*, No. 94-455, if adopted, would alleviate some of the burden that baseless motive-based claims may impose on public officials. In *Jones*, we argue that there is no meaningful distinction between denial of a summary-judgment motion based on an erroneous determination that plaintiff's evidence suffices to support the claim alleged and such a denial based on an erroneous determination that governing law was clear. In either circumstance, the district court's error deprives a public official of the entitlement, protected by qualified immunity, not to stand trial on an insubstantial claim. In either circumstance, we argue, interlocutory appeal is equally appropriate. Such an opportunity to appeal before trial would provide an added layer of protection against erroneous denials of qualified-immunity defenses.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20052

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 93-2068

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,
v.
J. MICHAEL QUINLAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, THE AMERICAN JEWISH CONGRESS AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

ANTHONY C. EPSTEIN
Counsel of Record
MARK D. HARRIS
JODIE L. KELLEY
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

March 1, 1995

(Additional Counsel Listed on Inside Cover)

ARTHUR B. SPITZER
ACLU FUND OF THE
NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

LESLIE A. BRUECKNER
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1717 Mass. Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 797-8600

MARC D. STERN
AMERICAN JEWISH
CONGRESS
15 E. 84th Street
New York, N.Y. 10028
(212) 879-4500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

IMPOSING HEIGHTENED PROCEDURAL AND EVIDENTIARY BURDENS ON *BIVENS* PLAINTIFFS IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S PRECEDENTS 7

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **Page**

Anderson v. Creighton, 483 U.S. 635 (1987) 14
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 11
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 5, 17
Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994) 9, 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12
Conley v. Gibson, 355 U.S. 41 (1958) 10
Crutcher v. Kentucky, 883 F.2d 502 (6th Cir. 1989) 9
Davis v. Passman, 442 U.S. 228 (1979) 5
Davis v. Scherer, 468 U.S. 183 (1984) 7
Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) 10
Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1491) 9, 14, 16
Farmer v. Brennan, 114 S. Ct. 1970 (1994) 11
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 19
Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield of Michigan, Inc., 740 F.2d 423 (6th Cir. 1984) 13
Gomez v. Toledo, 446 U.S. 635 (1980) 11
Harlow v. Fitzgerald, 457 U.S. 800 (1982) .... *passim*
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) . 10, 18
Holland v. United States, 348 U.S. 121 (1954) 9

Kimberlin v. Quinlan, 774 F. Supp. 1 (D.D.C. 1991) 4, 21
Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994) 4
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) 10, 11
Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir. 1987), *vacated in part*, 817 F.2d 144 (D.C. Cir. 1987), *reinstated sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) 18, 20
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960) 9
Mitchell v. Forsyth, 472 U.S. 511 (1985) 7, 14
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 2
Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988) 14
Resolution Trust Corp. v. North Bridge Assocs., 22 F.3d 1208 (1st Cir. 1994) 13
Siegert v. Gilley, 111 S. Ct. 1789 (1991) 14, 17
United States v. Lam Kwong-Wah, 924 F.2d 298 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 287 (1992) 9
United States v. National Treasury Employees Union, 63 U.S.L.W. 4133 (U.S. Feb. 22, 1995) 17
Wayte v. United States, 470 U.S. 598 (1985) 11

RULES

Federal Rule of Civil Procedure 8 ..... 10, 14
Federal Rule of Civil Procedure 9 10
Federal Rule of Civil Procedure 56 ..... *passim*

MISCELLANEOUS

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2741 (1983) 13
6 pt.2 J. Moore, *Moore's Federal Practice* ¶ 56.24 (2d ed. 1993) 13, 20
K. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597 (1989) 11

No. 93-2068

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,
v.
J. MICHAEL QUINLAN, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, THE AMERICAN JEWISH CONGRESS AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nation-wide, nonprofit, nonpartisan organization with nearly 300,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all Americans. Toward that goal, the ACLU has frequently represented individuals in civil actions seeking damages against government officials who have violated their constitutional rights. The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials for violations of constitutional rights. The ACLU and its affiliates have been involved in numerous *Bivens* actions before this Court, both as direct counsel and as *amicus curiae*, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political and economic rights of Jews. It has frequently found it necessary to engage in litigation to preserve these rights and not infrequently finds itself in those cases in the position of petitioner -- convinced that a wrong has been perpetrated but needing additional evidence to complete its proof of a violation of law. The rule of law applied here by the D.C. Circuit would deny the American Jewish Congress and those it represents a day in court.

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society. Through litigation and work with the broader public interest community, TLPJ seeks to challenge governmental, corporate, and individual wrongdoing, guard access to the courts, and combat threats to the civil justice system. TLPJ participates as *amicus curiae* in this case because it believes that imposition of a heightened pleading requirement in *Bivens* actions is contrary to the fundamental right of access to the civil justice system.

STATEMENT OF THE CASE

Four days before the 1988 presidential and vice-presidential election, and hours before federal inmate Brett C. Kimberlin was scheduled to hold a group interview with members of the national media to discuss allegations that he had sold marijuana to candidate Dan Quayle in the early 1970's, the then-Director of the Federal Bureau of Prisons, J. Michael Quinlan, cancelled the interview. Later that day, although Quinlan had never before made decisions about the segregation of individual prisoners, he personally ordered Kimberlin to be placed in administrative detention, where he was unable to communicate with the media. Quinlan's office had consulted with respondent Loye Miller, a senior Justice Department official, to whom the Bush-Quayle campaign had repeatedly complained about Kimberlin's ability to communicate with the press while incarcerated. Prison officials again placed Kimberlin in detention the day

before the national election, and yet again a few weeks later.

Kimberlin filed this *Bivens* action alleging that Quinlan and Miller prevented or punished his exercise of First Amendment rights, and that respondents' conflicting and inconsistent explanations for their actions were pretexts. Respondents moved for summary judgment before Kimberlin took any discovery. The district court denied the motion, and lifted its earlier stay of discovery relating exclusively to the *Bivens* claims, based on its finding that Kimberlin had offered "nonconclusory" and "tangible" factual allegations in support of his claims. *Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991). On respondents' interlocutory appeal, the Court of Appeals reversed, holding over a vigorous dissent that petitioner failed to meet the Circuit's heightened pleading, or heightened production, standard requiring direct as opposed to circumstantial evidence that respondents had acted with an impermissible motive. *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994). This Court granted certiorari on January 20, 1995. 115 S. Ct. 929 (1995).

SUMMARY OF ARGUMENT

This case presents a question of substantial practical importance in *Bivens* actions: in what circumstances may a plaintiff alleging violation of clearly established constitutional rights proceed with at least limited discovery when a defendant government official makes a pre-discovery motion for summary judgment? Rule 56(f) of the Federal

Rules of Civil Procedure defines these circumstances, allowing a plaintiff to proceed with discovery if she offers nonconclusory factual allegations indicating that discovery is likely to produce additional evidence sufficient to support a jury verdict in her favor. As several courts of appeals and Justices of this Court have indicated, this standard, and the district courts' authority over discovery, provide ample protection for blameless officials seeking relief from unjustified discovery burdens. No distortion of the Federal Rules through any heightened pleading requirement is justified. All that is necessary or appropriate is "firm application of the Federal Rules of Civil Procedure" as they are written. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.35 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)).

The Rule 56(f) standard strikes the appropriate balance between the legitimate interests of *Bivens* plaintiffs and *Bivens* defendants. "An agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971). Moreover, for individual victims of unconstitutional conduct, "it is damages or nothing," and a right without a remedy is not a right at all. *Id.* at 410.[2] It is therefore

---

[2] *See Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[U]nless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have

(continued...)

essential to preserve an effective constitutional remedy against government officials who violate clearly established constitutional rights. This standard gives *Bivens* plaintiffs, like plaintiffs in other kinds of cases, a reasonable opportunity to conduct appropriate discovery before they are forced to respond to the merits of a summary judgment motion.

At the same time, Rule 56(f) protects government officials from the unjustified burden of defending spurious suits. It prohibits *Bivens* plaintiffs from subjecting officials to extensive discovery based on nothing more than a vague hope that discovery will produce hard evidence, thereby permitting courts to resolve "many insubstantial claims on summary judgment" at the outset of the case. *See Harlow*, 457 U.S. at 818. Furthermore, trial judges have ample discretion within the existing framework of the Federal Rules to weigh any "peculiar[] disrupti[on] of effective government" in deciding how narrow or broad discovery should be. *See id.* at 817.

The standards applicable to *Bivens* actions should be developed consistent with one of the most basic principles on which our Constitution is built: the people need protection from governmental abuses more than the government needs protection from the people. The government poses a far greater threat to individual liberties than the people pose to governmental preroga-

---

[2] (...continued)
been violated . . . must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.").

tives. It is the highest duty of the federal courts to safeguard the rights of the people against the government.

ARGUMENT

IMPOSING HEIGHTENED PROCEDURAL AND EVIDENTIARY BURDENS ON *BIVENS* PLAINTIFFS IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S PRECEDENTS

This is not a case about qualified immunity. The standards under which government officials are entitled to qualified immunity from liability or suit were announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which held that qualified immunity depends *exclusively* on the "objective legal reasonableness of an official's conduct as measured by reference to clearly established law." *Id.* at 818. "No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (citations omitted). In this case, respondents have no qualified immunity defense because the First Amendment right that they allegedly violated was clearly established.[3] *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Accordingly, this case presents no occasion for the court to consider the standards for qualified immunity or the

---

[3] Understandably, respondents make no claim that the First Amendment even arguably leaves them free to prevent prisoners from, or punish prisoners for, communicating to the press on matters of public concern, or to treat different prisoners differently depending on whether prison officials agree with the information the prisoners provide to the press.

purely legal question of whether the constitutional right that respondents allegedly violated was clearly established.

Respondents sought summary judgment on the purely factual issue of whether they had acted with the intent or purpose of preventing petitioner from speaking with the press. What this case involves, then, is whether *Bivens* plaintiffs should be barred from pursuing discovery that would be available in any other case to establish the essential factual elements of their claim.

The answer lies in the Federal Rules of Civil Procedure, which provide a complete and neutral mechanism for resolving motions for summary judgment. As explained below, the existing framework of the Federal Rules gives federal courts ample power to protect federal employees lacking qualified immunity from the burdens of cases brought without any substantial factual basis. The Court need not, and may not, rewrite the Federal Rules to create any extraordinary standard applicable to motions to dismiss or for summary judgment in *Bivens* cases directed to the kinds of factual issues that federal courts routinely adjudicate in a variety of cases.

The Direct Evidence Rule. Instead of applying the Federal Rules as written, the court below held that respondents were entitled to pre-discovery summary judgment because petitioner failed to produce direct, as opposed to circumstantial, evidence of respondents' improper motive. As petitioner and the United States demonstrate in detail, any standard based on the notion that circumstantial evidence has no probative value is wholly unjustified.

Circumstantial evidence is "intrinsically no different from testimonial evidence" and can be "more certain, satisfying and persuasive than direct evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). Circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt in a criminal case, *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 287 (1992), and equally compelling circumstantial evidence is more than sufficient in a *Bivens* case. Moreover, a direct evidence requirement would effectively bar *Bivens* actions where motive is an element because in only the rarest of cases will the plaintiff have the defendant's confession of a deliberate constitutional violation. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991). These reasons explain why circuits other than the District of Columbia Circuit have uniformly rejected a direct evidence requirement. *See, e.g., Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994); *Elliott*, 937 F.2d at 345; *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

The "Heightened Pleading" Requirement. An equally illegitimate procedural obstacle would be a special pleading rule that requires extraordinary particularity solely in *Bivens* complaints.[4] *See, e.g., Branch*, 937 F.2d

---

[4] Although certiorari was granted on the question whether "plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a 'heightened pleading standard,'" we agree with the Solicitor General's earlier submission that resolution of this question is not essential to the determination of this case because petitioner

(continued...)

at 1386; *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984). Any requirement that the complaint plead unconstitutional motive with particularity simply cannot be squared with the language of the Federal Rules or with this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Under the notice pleading rule embodied in Rule 8, plaintiffs are *not* required to set out in detail the facts underlying their claims. *Conley v. Gibson*, 355 U.S. 41, 47 (1958). Rule 9 sets out the sole exceptions to the liberal pleading system, and Rule 9(b) specifically provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." For the same reasons that the Court interpreted these rules to mean what they say in the context of § 1983 actions against municipalities, a heightened pleading requirement in *Bivens* cases against government officials would be "impossible to square" with the Federal Rules' notice-

---

[4] (...continued)
provided greater specificity than would be required in a well-pleaded complaint.

pleading approach. *See Leatherman*, 113 S. Ct. at 1163-64.[5]

Summary Judgment Procedures. The procedural vehicle that most defendants use to obtain early resolution of *Bivens* cases is not a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, but rather a motion for summary judgment under Rule 56. *See* K. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 652 & n.220 (1989). Here, consistent with this practice, and before discovery began, respondents sought summary judgment on the "motive" element of petitioner's constitutional claim, that is, the allegation that respondents acted with the intent to punish or prevent his exercise of clearly established First Amendment rights.[6]

---

[5] A heightened pleading requirement would be even more inappropriate in the context of qualified immunity. "[Q]ualified immunity is a defense, [and] the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The possibility that the defendant will claim immunity does not impose on the plaintiff "an obligation to anticipate such a defense" and plead around it in the complaint. *Id.* If a plaintiff need not plead any facts at all in anticipation of such a defense, surely she cannot be required to plead those facts with special particularity.

[6] An essential element of many constitutional violations involves the intent or motive of the government official. *See, e.g., Farmer v. Brennan*, 114 S. Ct. 1970, 1977 (1994) ("To violate the cruel and unusual punishments clause, a prison official must have a 'sufficiently culpable state of mind.'") (citation omitted); *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution claim must be supported by evidence of discriminatory purpose); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under equal protection clause).

What standards, then, should be applied when the defendant in a *Bivens* case moves for summary judgment at the beginning of the lawsuit before the plaintiff has had an opportunity to conduct any discovery? Under the Federal Rules of Civil Procedure, the plaintiff has two procedural options. First, under Rule 56(c), she can offer evidence that creates a genuine dispute about a material fact. The evidence must be sufficient to support a jury verdict in her favor on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (citation omitted). The trial court's responsibilities in this situation are plain and, *amici* believe, undisputed: if the plaintiff can meet this burden at the initial stages of a case, the trial court must deny the summary judgment motion and allow the plaintiff to conduct appropriate discovery to obtain additional evidence to further strengthen her case.

The plaintiff's other procedural option is to submit a Rule 56(f) affidavit demonstrating why she does not have sufficient facts within her possession *at that stage of the case* to create a genuine dispute about a material fact. Under Rule 56(f), the non-movant may offer an affidavit explaining the reasons why she cannot *at that time* set forth facts essential to justify her opposition. The paradigmatic reason a party would not have such essential facts is that she has not yet been able to take necessary discovery. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (Rule 56(f) allows a summary judgment motion to be denied "if the non-moving party has not had an opportunity to make full discovery"); *Liberty Lobby, Inc.*, 477 U.S. at 250 n.5 (same). Adjudication of summary judgment motions before discovery is especially likely to be unfair when

knowledge of the relevant facts "is exclusively with or largely under the control of the moving party." 6 pt. 2 J. Moore, *Moore's Federal Practice* ¶ 56.24, at 56-809 (2d ed. 1993) ("*Moore's Federal Practice*"); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2741, at 545 (1983) ("*Wright, Miller & Kane*"). In these circumstances, the party opposing summary judgment should be given the opportunity to obtain those facts through discovery. *Moore's Federal Practice* ¶ 56.24, at 56-809; *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1208 (1st Cir. 1994); *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, Inc.*, 740 F.2d 423, 427 (6th Cir. 1984).

A Rule 56(f) affidavit must do more than merely assert in conclusory terms a need for discovery. The plaintiff must present a "plausible basis for a belief that discoverable materials exist" that would be likely to raise a genuine issue of material fact. *North Bridge Assocs.*, 22 F.3d at 1206. Mere speculation or an unexplained "averment of . . . exclusive knowledge or control of the facts" by the moving party will not suffice. *Moore's Federal Practice* ¶ 56.24, at 56-811; *Wright, Miller & Kane* § 2741, at 548. The non-movant must identify specific facts within the movant's control, explain how discovery is likely to lead to those facts, and show that those facts are likely to create a factual question properly resolved at trial. *Moore's Federal Practice* ¶ 56.24, at 548-52.

The standard Rule 56(f) test that is applied in other kinds of cases can and should be applied in *Bivens* actions. As several Justices of this Court and several courts of appeals have stated, a *Bivens* plaintiff should be allowed

to proceed with at least limited discovery if she produces "specific, nonconclusory factual allegations" supporting her case in response to a pre-discovery summary judgment motion. *See Siegert v. Gilley*, 111 S. Ct. 1789, 1795 (1991) (Kennedy, J., concurring in the judgment); *id.* at 1801 (Marshall, J., dissenting); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). This Court has itself recognized that plaintiffs should be allowed to conduct discovery "to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts" that violated clearly established law. *Mitchell v. Forsyth*, 457 U.S. 511, 526 (1985); *see also Anderson v. Creighton*, 483 U.S. 635, 646-47 n.6 (1987) (discovery "tailored specifically to the question of . . . qualified immunity" should be permitted).

When a defendant in a *Bivens* case, or any other case, moves for summary judgment before discovery has begun, Rule 56(f) may require the plaintiff to present factual allegations more specific than those sufficient to satisfy the notice-pleading requirement of Rule 8. For example, although a general allegation of unconstitutional intent is sufficient to survive a motion to dismiss, it may not be adequate when the defendant files a summary judgment motion with supporting evidence indicating the absence of any illegitimate motive. Thus, a plaintiff alleging malice would not be able to defeat or delay the defendant's

motion for summary judgment with purely conclusory allegations.[7]

Equally important, however, the Rule 56(f) standard does *not* require the plaintiff to possess at the outset of the case evidence sufficient to support a favorable jury verdict. If she already possesses the facts "essential to her opposition," invocation of Rule 56(f) would be unnecessary, and she could defeat summary judgment outright under Rule 56(c). The requirement that a *Bivens* plaintiff produce specific, nonconclusory factual allegations in response to a pre-discovery summary judgment motion is significantly less demanding than the burden imposed by Rule 56(c). *Tunnell*, 937 F.2d at 1387-88. Put differently, the showing that a plaintiff must make to get discovery is less than the showing necessary to defeat summary judgment and get to trial. Plaintiffs in *Bivens* cases should not face a unique and unfair obligation to be ready for trial even before they file their lawsuit.

To impose a "heightened" Rule 56(f) test in *Bivens* cases would be neither necessary nor appropriate. The standard Rule 56(f) test gives *Bivens* plaintiffs a reasonable opportunity to pursue discovery when they can provide a non-conclusory basis for their allegations that the defendants did in fact violate their clearly established constitutional rights. Moreover, as shown above, the standard

---

[7] The same would be true of the wide variety of legal and equitable claims -- *e.g.*, malicious prosecution, abuse of process, fraud, tortious interference with contractual relations -- that require allegation and proof of malice or similar states of mind.

Rule 56(f) test provides ample protection for the legitimate interests of *Bivens* defendants. If the plaintiff cannot provide some non-conclusory support for the general factual allegations in her complaint, summary judgment is properly granted at that point, allowing the defendant to avoid the burdens associated with full scale litigation. *See Elliott*, 937 F.2d at 345 ("Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.").

Government officials have argued that they deserve special protection because the burdens of *Bivens* litigation are simply too great for them to have to bear. Litigation is undeniably a burden, but it is important to put in perspective the weight of the burden that will be borne by federal officials in these cases. The government generally pays all the costs of defense and provides free legal representation for its employees. In addition, employees need not spend significantly more time in connection with damages cases than in the defense of injunctive cases, yet no one has ever suggested that plaintiffs seeking injunctive relief for constitutional violations should have to make extraordinary showing to obtain the discovery necessary to prepare their cases.

Moreover, individuals have a broad range of statutory causes of action against federal officials, including causes of action that turn on questions of motive and intent, such as claims of disparate treatment based on race, sex, national origin, handicap, and so on. Discovery proceeds every day in such cases under the usual standards of the Federal Rules of Civil Procedure. Those cases -- undoubt-

edly far greater in volume than *Bivens* litigation -- have not disabled the government from conducting the people's business. In any event, it would surely stand the Bill of Rights on its head to hold that the vindication of individual rights protected by the First, Fourth and Fifth Amendments holds a disfavored place in the federal courts compared to the vindication of rights created by statute.

It is also important to note that *Bivens* actions can be, and are, brought against low- as well as high-level federal employees. *See, e.g., Siegert v. Gilley*, 111 S. Ct. 1789 (1991) (*Bivens* action against psychologist at government hospital). Indeed, the defendants in the *Bivens* case itself were non-supervisory federal law enforcement agents. *See Bivens*, 403 U.S. at 389. Even if courts should be careful to avoid undue interference with the important public business of high officials, courts need not exempt all 1.7 million federal employees (*see United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4137 n.13 (U.S. Feb. 22, 1995)) from the Federal Rules of Civil Procedure.

A heightened Rule 56(f) standard in *Bivens* cases is as unwarranted when the factual issues involve the defendant's state of mind as when they involve her actions. The rationale used by some courts of appeals for a heightened standard where motive or intent is at issue is that *Harlow* requires some procedural mechanism to weed out cases where the plaintiff has no significant evidence of illegitimate motive or intent and that summary judgment does not accomplish this function because defendants can rarely obtain summary judgment concerning their state of mind.

See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984). Unlike this case, however, *Harlow* did not involve interpretation or application of the Federal Rules. Rather, it involved a modification of judicially crafted immunity rules so that those rules did not magnify the very risk of litigation they were designed to avoid. This case, by contrast, is squarely governed by the Federal Rules of Civil Procedure. Difficulties that one class of defendants may have in prevailing under the summary judgment provisions of the Federal Rules do not justify rewriting the Rules for their benefit.

In addition, as explained above, Rule 56(f) as written provides federal courts with all the authority they need to dismiss at an early stage cases where the plaintiff does not have a tangible basis for allegations of unconstitutional motive or intent. To grant summary judgment in the face of a Rule 56(f) affidavit that sets forth specific, nonconclusory grounds for plaintiff's assertion of improper motive would deny a significant number of plaintiffs a fair opportunity to prove their cases. Such a result would effectively put government employees above the law in the wide range of circumstances where the Constitution gives individuals a clearly established right against improperly motivated government conduct. *See* note 6 above; *see also Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1437 (D.C. Cir. 1987) (R.B. Ginsburg, J.) ("Allowing plaintiffs to raise certain claims of unconstitutional motive could become an empty gesture were we to impose a blanket restriction on *all* discovery prior to resolution of the qualified immunity issue on summary judgment.") (emphasis in original), *vacated in part*, 817 F.2d 144 (D.C.

Cir. 1987), *reinstated sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) (*en banc*).

Controls on Discovery. In any kind of case, including *Bivens* cases, where some discovery into critical factual issues is warranted, any discovery burdens that are undue or excessive can be avoided through the district court's broad authority over the scope of discovery. This judicial discretion makes even more inappropriate any heightened Rule 56(f) test in *Bivens* cases. A plaintiff who satisfies Rule 56(f) does not necessarily have the right to conduct unfettered discovery. The Federal Rules give district judges ample authority to protect *Bivens* defendants (like other defendants) with legitimate complaints about the breadth of the discovery sought by the plaintiff.

According to Rule 56(f) itself, when the non-movant presents adequate reasons for her inability to defeat the summary judgment motion without discovery, the court has several options: "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Trial judges are in the best position to determine how much discovery is appropriate in light of a plaintiff's specific factual allegations, and they can control discovery by, for example, limiting the number or scope of interrogatories or depositions or the time allowed to complete discovery. As this Court noted in *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 265 (1968), Rule 56(f) "provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment

motion, [compared to] Rule 26, which provides for broad pretrial discovery." *See also Moore's Federal Practice* ¶ 56.24, at 56-808 to -809; *Martin*, 812 F.2d at 1438 (suggesting district court should permit "particularized interrogation" of defendants on one critical meeting).

In exercising their discretion over discovery, district courts should give due weight not only to the legitimate interests of federal officials in avoiding unduly burdensome discovery, but also to the legitimate interests of individuals whose clearly established constitutional rights are at stake. For the past two decades, *Bivens* actions have played a critical role in redressing injuries inflicted by federal government officials acting totally contrary to their clearly established constitutional obligations.

Maintenance of effective *Bivens* remedies also deters lawless overreaching by government officials. No less than victims of private wrongs, victims of governmental wrongs deserve a reasonable opportunity to obtain discovery before adjudication of the merits of their claims. Otherwise, federal officials would be cloaked with an absolute immunity that the Court has already deemed inappropriate. *See Harlow*, 457 U.S. at 808-13. As this Court recognized in *Harlow*, "firm application of the Federal Rules of Civil Procedure" protects against insubstantial lawsuits. *Id.* at 819 n. 35 (citation omitted).

Application of these principles to the facts of this case is straightforward. The district court applied the appropriate legal standard, asking whether petitioner presented allegations of "concrete facts" that are "tangible and

nonconclusory." *Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991). Petitioner satisfied this standard by presenting factual allegations that met the standard of Rule 56(c), not just Rule 56(f). To the extent that discovery on the *Bivens* claim should be limited to avoid an undue burden on respondents, the district court has ample authority to do so on remand.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
132 West 43rd Street
New York, N.Y. 10036

ANTHONY C. EPSTEIN
Counsel of Record
MARK D. HARRIS
JODIE L. KELLEY
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005

ARTHUR B. SPITZER
ACLU FUND OF THE
NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036

MARC D. STERN
AMERICAN JEWISH
CONGRESS
15 E. 84th Street
New York, N.Y. 10028

LESLIE A. BRUECKNER
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1717 Mass. Ave., N.W.
Suite 800
Washington, D.C. 20036

Supreme Court, U.S.
FILED
MAR 28 1995
OFFICE OF THE CLERK

No. 93-2068

In The

Supreme Court of the United States

October Term, 1994

BRETT C. KIMBERLIN,

Petitioner,

vs.

J. MICHAEL QUINLAN, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARKANSAS, CALIFORNIA, DELAWARE, IDAHO, INDIANA, KANSAS, KENTUCKY, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW YORK, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS IN SUPPORT OF RESPONDENTS

MARGERY S. BRONSTER
Attorney General
State of Hawaii

GIRARD D. LAU*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus Curiae State of Hawaii

[Other Counsel of Record Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

WINSTON BRYANT
Attorney General of
Arkansas
Office of the Attorney
General
200 Tower Building
323 Center Street
Little Rock, Arkansas
72201-2610
(501) 682-2007

DANIEL E. LUNGREN
Attorney General of
California
1515 K Street
Sacramento, California
95814
(916) 324-5437

M. JANE BRADY
Attorney General of
Delaware
820 N. French Street
Wilmington, Delaware
19801
(302) 577-3838

ALAN G. LANCE
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

PAMELA CARTER
Attorney General of
Indiana
402 West Washington
Street
Indianapolis, Indiana
46204
(317) 232-6201

CARLA J. STOVALL
Attorney General of
Kansas
201 W. 10th Street,
2d Floor
Topeka, Kansas 66612-1597
(913) 296-2215

CHRIS GORMAN
Attorney General of
Kentucky
State Capitol
Room 116
Frankfort, Kentucky 40601
(502) 564-7600

HUBERT H. HUMPHREY III
Attorney General of
Minnesota
102 State Capitol
St. Paul, Minnesota 55155
(612) 297-4272

MIKE MOORE
Attorney General of
Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

JEREMIAH W. NIXON
Attorney General of
Missouri
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri
65102
(314) 751-3321

JOSEPH P. MAZUREK
Attorney General of
Montana
State of Montana
Justice Building
P.O. Box 201401
Helena, Montana
59620-1401
(406) 444-2026

JEFFREY R. HOWARD
Attorney General of
New Hampshire
Office of the Attorney
General
33 Capitol Street
Concord, New Hampshire
03301
(603) 271-3655

VICTORIA A. GRAFFEO
Attorney General of
New York
Department of Law –
The Capitol, Rm. 220
Albany, New York 12224
(518) 474-8101

BETTY D. MONTGOMERY
Attorney General of Ohio
State Office Tower
30 East Broad Street,
17th Floor
Columbus, Ohio
43215-3428
(614) 466-4940

DREW EDMONDSON
Attorney General of
Oklahoma
4545 N. Lincoln Blvd.,
Suite 260
Oklahoma City, Oklahoma
78105-3496
(405) 521-4274

JEFFREY B. PINE
Attorney General of
Rhode Island
72 Pine Street
Providence, Rhode Island
02903
(401) 274-4400

MARK BARNETT
Attorney General of
South Dakota
Office of the Attorney
General
500 East Capitol
Pierre, South Dakota
57501-5070
(605) 773-3215

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-9600

JEFFREY L. AMESTOY
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-3171

JAMES S. GILMORE, III
Attorney General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

JAMES E. DOYLE
Attorney General of Wisconsin
State Capitol
Post Office Box 7857
Suite 114 East
Madison, Wisconsin 53707-7857
(608) 266-1221

RICHARD WEIL
Attorney General of the Commonwealth of the Northern Mariana Islands
Office of the Attorney General
Second Floor, Administration Building
Capitol Hill, Saipan MP 96950
(670) 322-4311

ALVA A. SWAN
Acting Attorney General of the Virgin Islands
G.E.R.S. Building, Ste. 1
48B-50C Kronprinsdens Gade
St. Thomas, U.S. Virgin Islands 00802
(809) 774-5666

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. A Heightened Pleading Standard is Necessary to Protect Qualified Immunity in All Improper Motive Cases Against Government Officials 4

II. Under the Heightened Pleading Standard, Plaintiffs Must Plead or Come Forward with Direct, as Opposed to Circumstantial, Evidence of Improper Motive, or, at the Very Least, Plead or Present Very Strong or Substantial Evidence of Improper Motive, whether Direct or Circumstantial, Before Being Allowed to Burden Governmental Officials with Discovery and/or Trial... 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Creighton, 483 U.S. 635 (1987) 4

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) 8

Brown v. Frey, 889 F.2d 159 (8th Cir. 1989), *cert. denied*, 493 U.S. 1088 (1990) 8

Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986) 8

Dunbar Corp. v. Lindsey, 905 F.2d 754 (4th Cir. 1990) 8

Elliot v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, 1242 (1992) 8

Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988) 7

Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..... *passim*

Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) 9

Jackson v. City of Beaumont Police Dep't, 958 F.2d 616 (5th Cir. 1992) 8

Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), *cert. granted*, 115 S. Ct. 929 (1995) 5, 11, 12, 13, 14

Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986) 6

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) 9, 10

Lewis v. City of Ft. Collins, 903 F.2d 752 (10th Cir. 1990) 6

Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) ...3, 7

Malley v. Briggs, 475 U.S. 335 (1986) 5

TABLE OF AUTHORITIES – Continued

Page

Martin v. D.C. Metropolitan Police Dep't, 812 F.2d 1425 (D.C. Cir. 1987) 9, 12

Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987) 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 4, 6

Oladeinde v. City of Birmingham, 963 F.2d 1481 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993) 9

Perry v. Louisiana, *cert. denied*, 461 U.S. 961 (1983) 9

Pueblo Neighborhood Health Ctrs, Inc. v. Losavio, 847 F.2d 642 (10th Cir. 1988) 8

Sawyer v. County of Creek, 908 F.2d 663 (10th Cir. 1990) 6

Schultea v. Wood, No. 93-2186 (5th Cir. March 9, 1995) (en banc) 10, 11

Siegert v. Gilley, 500 U.S. 226 (1991) 9

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 11

United States v. Brown, 333 U.S. 18 (1948) 11

United States v. McNinch, 356 U.S. 595 (1958) 9

STATUTES & RULES:

Freedom of Information Act, 5 U.S.C. § 552 (1988) 7

Fed. R. Civ. P. 8(a)(2) 11

Fed. R. Civ. P. 9(b) 11

MISCELLANEOUS:

Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure under the Wisconsin Open Records Law*, 1994 Wis. L. Rev. 719, 727-28 n. 42 (1994) 7

No. 93-2068

In The

Supreme Court of the United States

October Term, 1994

BRETT C. KIMBERLIN,

Petitioner,

vs.

J. MICHAEL QUINLAN, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARKANSAS, CALIFORNIA, DELAWARE, IDAHO, INDIANA, KANSAS, KENTUCKY, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW YORK, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS IN SUPPORT OF RESPONDENTS

The amici States enumerated above, by their respective Attorneys General, submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the proceeding below on October 8, 1993.

INTEREST OF AMICI CURIAE

The amici States have a very significant interest in securing the critical protections provided by the doctrine of qualified immunity for *state* governments and their officials, by the imposition of a heightened pleading standard in improper motive cases. Without a heightened pleading standard to eliminate baseless cases early, states will be forced needlessly to assume the costly and disruptive burdens of discovery and trial, simply to defend necessary official actions from frivolous charges.

SUMMARY OF ARGUMENT

The critical protections provided by the doctrine of qualified immunity, recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and consistently respected in following cases, would be effectively eviscerated by allowing plaintiffs to force state officials to assume the tremendous burden and expense of discovery and trial, in baseless cases, simply by making conclusory assertions of improper motive. The "heightened pleading standard" applied in this case respects the interests protected by qualified immunity by requiring plaintiffs to plead (at the motion to dismiss stage), or put forth evidence of (at the summary judgment stage), *specific nonconclusory* facts establishing the improper motive.

Significantly, application of a heightened pleading standard would not eliminate, to any significant degree, meritorious suits, because 1) plaintiffs unable to meet the standard would be unlikely to have a valid case to begin with, and should not be allowed to go on a "fishing

expedition," 2) plaintiffs, without engaging in direct discovery of governmental officials, have adequate alternative means of developing their case to meet the standard, and 3) where a defendant is able to avoid yielding extrinsic evidence of improper motive, it is unlikely that even direct discovery of that defendant would produce any incriminating evidence, either.

Indeed, a "heightened pleading standard," at the summary judgment stage, is nothing more than an application of this Court's requirement that parties seeking to avoid summary judgment set forth "specific facts," not "conclusory allegations," to sustain the complaint. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990). The heightened pleading standard has received virtually unanimous support among the federal circuits and has been endorsed by several members of this Court, and, contrary to petitioner's assertions, is not foreclosed by any of this Court's prior decisions or the Federal Rules.

Furthermore, in order to fully protect the amici States' *Harlow* interests, plaintiffs must be required to come forward with direct, as opposed to merely circumstantial, evidence of improper motive, or, at the very least, come forward with *very strong or substantial* specific factual evidence, whether "direct" or "circumstantial," to justify subjecting government officials to the burdens of discovery and/or trial. To allow plaintiffs to proceed based upon anything less than strong circumstantial (or direct) evidence of improper motive would significantly weaken the necessary protections provided by qualified immunity.

ARGUMENT

I. A Heightened Pleading Standard is Necessary to Protect Qualified Immunity in All Improper Motive Cases Against Government Officials.

This Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), wisely recognized the huge costs of subjecting government officials to the risks of trial, including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from pubic service," 457 U.S. at 816. The Court further concluded that even before trial, burdens imposed by *discovery* into "subjective motivation" could be "peculiarly disruptive of effective government." 457 U.S. at 817. This Court has demonstrated such a strong commitment to avoiding these harms that it even created an "exception" to the "final decision rule" by authorizing interlocutory appeals from denials of summary judgment where qualified immunity is raised, emphasizing that qualified immunity "is an *immunity from suit* [i.e. "trial" and "the other burdens of litigation"] rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (*Harlow* immunity is designed to protect officials from "broad-ranging discovery").

In short, this Court in *Harlow* and its progeny has struck a fine balance between the interests of effective government and the interests of plaintiffs seeking vindication of their constitutional or statutory rights by setting forth a qualified immunity standard that shields government officials from discovery as well as trial when

their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known," 457 U.S. at 818. Since *Harlow*, the Court has developed the qualified immunity defense to the point where it "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Following this Court's qualified immunity decisions, several courts of appeals, including the lower court in this case, have adopted standards of pleading in improper motive actions against government officials that require plaintiffs to "plead[ ] specific . . . evidence of intent to defeat a motion to dismiss and [to produce] such evidence to defeat a motion for summary judgment." *Kimberlin v. Quinlan*, 6 F.3d 789, 793-94 (D.C. Cir. 1993).

Petitioner's contention that such requirements are impermissible would, if adopted by this Court, effectively eliminate the doctrine of qualified immunity in improper motive cases, thereby bringing about the very harms this Court has consistently sought to avoid. A plaintiff with an absolutely meritless case, in which there is no evidence at all to support plaintiff's claim that the government official acted with an improper motive, would be able to survive dismissal or summary judgment by the simple expedient of alleging in his or her complaint, or stating in an affidavit, the wholly conclusory assertion that the defendant official acted with the improper motivation, without providing any specific facts that would support that speculative assertion. Indeed, the plaintiff could make such groundless assertions without technically violating Rule 11 or committing perjury, as the

state of a third party's mind is ultimately unknowable except by inference.

Thus, it is clear that without a heightened pleading standard plaintiffs in improper motive cases would almost always be able to impose the heavy discovery and trial harms this Court struggled to avoid, even in entirely meritless cases. Only by imposing a standard of pleading that forces the plaintiff in such improper motive cases to, at the very least, allege, or put forth evidence of, *specific nonconclusory facts demonstrating improper motive* can this Court restore the balance this Court has consistently sought to maintain. If qualified immunity is to have any force at all in improper motive cases, this heightened pleading standard is an absolute necessity.

Importantly, imposition of the heightened pleading standard would not, to any significant degree, eliminate meritorious suits. First, any plaintiff who cannot come forward with specific non-conclusory allegations or evidence of improper motive likely does not have a meritorious case anyway. To allow plaintiff to burden governmental defendants with discovery under those circumstances is to sanction a purely speculative "fishing expedition" that Courts have always condemned. *See, e.g., Sawyer v. County of Creek*, 908 F.2d 663, 668 (10th Cir. 1990) (citing *Mitchell v. Forsyth*, 472 U.S. at 526) ("A federal lawsuit [can]not [be] a fishing expedition [or else] we would defeat the rationale for the qualified immunity defense."); *Lewis v. City of Ft. Collins*, 903 F.2d 752, 759 (10th Cir. 1990) ("Rule 56(f) is not a license for a fishing expedition, especially when summary judgment is urged based on a claim of qualified immunity."); *Kompare v. Stein*, 801 F.2d 883, 889 (7th Cir. 1986) (citing *Mitchell*,

supra) (same); *Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir. 1988) (same); *Martin v. Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987) (same).

Furthermore, even if a plaintiff is not allowed to engage in direct discovery of government officials until after he or she has overcome the heightened pleading standard, a plaintiff can meet that standard by investigating all other matters, including non-governmental witnesses, that can lead to evidence of improper motive. In addition, because governmental agencies, both federal and state, are subject to comprehensive public records disclosure laws, *see, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1988), and equivalent state laws,[1] plaintiffs already have an effective means of inquiring into governmental officials' actions, statements, and motives not available where private defendants are involved. Finally, if a governmental official is so adept at hiding his or her improper motive so as to leave no extrinsic evidence of that motive, it is highly unlikely that direct discovery of that same official will bring out any critical admissions, or other smoking gun, either. For these reasons, therefore, a heightened pleading standard is unlikely to eliminate, to any significant degree, truly meritorious suits.

Moreover, this so-called "heightened pleading standard" is really not a novel invention but simply a recognition of the especial force this Court's holding in *Lujan v. National Wildlike Fed'n*, 497 U.S. 871, 888 (1990), has where

---

[1] *See* state statutes cited in Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure under the Wisconsin Open Records Law*, 1994 Wis. L. Rev. 719, 727-28 n. 42 (1994).

qualified immunity concerns are involved. This Court in *Lujan* has already required that in *all* cases, not just qualified immunity cases, parties wishing to avoid summary judgment may not rest upon an "affidavit containing *general* allegation[s] of injury" but instead must aver "requisite *specific* facts." 497 U.S. at 889. As this Court rightly recognized, the purpose of Rule 56 was "not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit" at summary judgment. 497 U.S. at 888. To reject a heightened pleading standard in cases like the one at bar would allow plaintiff to go forward simply by making conclusory averments in an affidavit of improper motive, in direct violation of *Lujan*. Given that this is a qualified immunity case with the additional attendant goals of avoiding the heavy burdens imposed on government by discovery and trial, the *Lujan* doctrine becomes all the more compelling and virtually dictates the so-called "heightened pleading standard," at least at the summary judgment stage.

That a heightened pleading standard is appropriate is made all the clearer by the fact that virtually every circuit that has considered the issue has chosen to adopt a heightened pleading standard. *See, e.g., Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, 1242 (1992); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989), *cert. denied*, 493 U.S. 1088 (1990); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Pueblo Neighborhood Health Ctrs, Inc. v. Losavio*, 847 F.2d

642, 649-50 (10th Cir. 1988); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984).

Not only does this consensus among the federal courts of appeals plainly suggest the wisdom of adopting a heightened pleading standard, *see United States v. McNinch*, 356 U.S. 595, 599-600 (1958) (attaching weight to consensus view among circuits), but it also counsels against overturning a relatively long-standing practice that apparently has been so workable and appropriate that it continues to receive the support of the many and varied courts of appeals. *Cf. Perry v. Louisiana*, *cert. denied*, 461 U.S. 961, 962-63 (1983) (opinion of Stevens, J., joined by Blackmun & Powell, JJ.) (supporting notion of allowing other courts to first "serve as laboratories" before Supreme Court decides important procedural questions).

Indeed, at least five current or former members of this very Court have expressly supported a heightened pleading standard in cases like the one at bar. *See Siegert v. Gilley*, 500 U.S. 226, 235-36 (1991) (Kennedy, J., concurring in the judgment); 500 U.S. at 246 (Marshall, Blackmun, & Stevens, JJ., dissenting) (requiring plaintiff, as a prerequisite to any discovery, to put forth more than "bare conclusory allegations of unconstitutional purpose"); *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (opinion of Ginsburg, R.B., J.).

Finally, this Court is certainly not bound by any of its past decisions, including *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), to reject a heightened pleading standard. Indeed,

this Court in *Leatherman*, while rejecting a heightened pleading standard for claims alleging *municipal* liability, expressly distinguished, and reserved, the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 113 S. Ct. at 1162. Indeed, Courts since *Leatherman* have continued to apply a heightened pleading standard. *See* cases cited in United States' Brief at 26 n.27.[2] *Leatherman*, therefore, is plainly not controlling.

In any event, the logic and reasoning of *Leatherman* simply do not apply to cases where the qualified immunity of individual government officials is at stake. The principal underpinning of this Court's ruling in *Leatherman* was its rejection of the municipality's claim that a heightened pleading standard should apply in order to avoid subjecting "municipalities to expensive and time consuming discovery in every § 1983 case, eviscerating their *immunity from suit* and disrupting municipal functions." 113 S. Ct. at 1162. Once this Court noted that municipalities do *not* enjoy any such immunity, *see id.*, the municipality's theory naturally crumbled. Because, on the contrary, the individual governmental officials in the case at bar *do* enjoy qualified immunity, not imposing a heightened pleading standard would indeed, as discussed above, "eviscerat[e] their immunity from suit and disrupt [government] functions." *Id.*

---

[2] *See also Schultea v. Wood*, No. 93-2186 (5th Cir. March 9, 1995) (en banc), where the entire en banc panel upheld a heightened pleading standard, albeit in different forms, even after *Leatherman*.

Second, although petitioner argues that the language of Rules 8(a)(2) & 9(b), Fed.R.Civ.P., and the doctrine of *expressio unius est exclusio alterius* do not allow a heightened pleading standard, the overriding rule of statutory construction is that even the plain language of rules or statutes must not be followed where it would lead to an absurd result. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Because the fundamental goals promoted by the qualified immunity doctrine would be defeated if plaintiffs could evade motions to dismiss and impose huge discovery burdens upon governmental officials by simply pleading conclusory allegations of improper motive, Rules 8(a)(2) & 9(b) cannot be read to bar a heightened pleading standard.[3]

Even if this Court were to adopt the rigid reading of Rules 8(a)(2) & 9(b) that petitioner proposes, and reject a heightened pleading standard for *motions to dismiss*, at the very least this Court should impose a heightened pleading standard at the *summary judgment* stage, by requiring plaintiffs to adduce specific nonconclusory factual evidence showing improper motive.[4] For it is undisputed that Rules 8(a)(2) & 9(b) are inapplicable at the summary judgment stage. *See Kimberlin*, 6 F.3d at 794 n.9. Indeed, this Court in *Leatherman*, despite rejecting a heightened

---

[3] As an alternative, the Fifth Circuit en banc majority in *Schultea* turned instead to Fed.R.Civ.P. *7(a)* to allow a heightened pleading standard to be imposed via a *reply* pleading.

[4] The term "heightened *pleading* standard" would actually be a misnomer because at the Rule 56 stage a court would be going beyond the pleadings to include consideration of the evidence. *See Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8.

pleading standard for municipalities at the dismissal stage, expressly encouraged application of a heightened standard at the summary judgment stage by advising the municipality and lower courts to "rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." 113 S. Ct. at 1163.

II. Under the Heightened Pleading Standard, Plaintiffs Must Plead or Come Forward with Direct, as Opposed to Circumstantial, Evidence of Improper Motive, or, at the Very Least, Plead or Present Very Strong or Substantial Evidence of Improper Motive, whether Direct or Circumstantial, Before Being Allowed to Burden Governmental Officials with Discovery and/or Trial.

The Court below held that Kimberlin "was required to proffer *direct* evidence of unconstitutional motive . . . and was precluded from relying on mere circumstantial evidence." *Kimberlin*, 6 F.3d at 795. That holding was a reasonable one because requiring plaintiffs in improper motive cases to produce *direct*, as opposed to merely *circumstantial*, evidence of improper motive would further this Court's goal of protecting government from unnecessarily shouldering the heavy costs imposed by discovery and trial, where plaintiffs have no worthy claim. Circumstantial evidence, after all, encompasses a tremendously broad and virtually unlimited set of evidentiary facts. Because inferences supporting a particular position can be derived from almost any fact or set of facts, plaintiffs could come up with such evidence no matter how weak their case was. For example, in a case like the one at bar, Mr. Kimberlin could say that any *one*

of the following hypothetical "facts" provides circumstantial evidence of improper motive: 1) the mere "timing" fact that he was segregated shortly after he sought to publicize his accusations against Quayle, 2) that defendants were Quayle backers, and 3) that the motives given by defendants were plausible but not probable. Yet surely this Court would not want to allow such a case to go forward based upon even the cumulative effect of those three "facts."

Because a plaintiff with even the weakest case could almost always come up with some circumstantial evidence of improper motive, requiring the plaintiff to come forward with direct evidence of improper motive will provide the strongest protection for the *Harlow* goals. Justice Ginsburg, while a Circuit Judge, adopted such a requirement. *See Martin v. D.C. Metropolitan*, 812 F.2d at 1435.

However, because it must be conceded that there are practical and logical difficulties in drawing a strict line between direct and circumstantial evidence, *see Kimberlin*, 6 F.3d at 798 (Williams, J., concurring); 6 F.3d at 808-09 (Edwards, J., dissenting,) the amici States suggest a couple alternative formulations of the heightened pleading standard that will protect the *Harlow* interests while avoiding the necessity for distinguishing between direct and circumstantial evidence. Each of these alternatives centers instead upon the *strength* of the evidence, regardless of whether direct or circumstantial.[5] Under the first

---

[5] After all, the distinction between direct and circumstantial evidence is ultimately only quantitative, rather than

proposed alternative standard, plaintiffs would be required to come forward with such compelling specific non-conclusory factual evidence of improper motive, whether direct or circumstantial, that if the evidence were accepted as true, any reasonable jury would have to find that defendants acted with the improper motive. This standard would protect the *Harlow* interests by weeding out all cases except those in which plaintiff can come forward with very strong evidence of improper motive. This formulation, apparently the United States' fallback position in the appeal below, *see Kimberlin*, 6 F.3d at 798 (Williams, J., concurring), would not only avoid the burdens of discovery and trial, but would discourage even the *filing* of lawsuits except where plaintiff has already in hand very strong evidence of improper motive.

A second and more moderate proposed alternative would require the plaintiff to come forward with strong specific non-conclusory factual evidence of improper

---

qualitative, because all evidence simply falls upon a continuum from direct to circumstantial. For even the most quintessential example of *direct* evidence – the eyewitness account where, for example, B says "I saw A run the red light" – still requires numerous assumptions to be probative of whether A actually ran the red light. B must have good perception (here, eyesight), B must have good memory of the event, B must be able to convey his perception properly, and finally, B must be telling the truth. Thus, B's account can be seen as merely *circumstantial* evidence.

Thus, it may be more productive, and more defensible, to look to the strength or probative value of plaintiff's evidence – rather than its character as "direct" or "circumstantial" – in deciding whether government officials must be subjected to the heavy burdens of discovery and trial.

motive, whether direct or circumstantial, such that, if the evidence were accepted as true, the court, as factfinder, would find that it was more likely than not that defendants acted with the improper motive. This position, while not as stringent as the first, would serve the *Harlow* interests by forcing plaintiffs to come forward with evidence of improper motive that is strong enough to cause the judge to conclude that the defendants acted with improper motive. Indeed, if a plaintiff cannot produce at least enough evidence to convince the judge that the defendant acted with an improper motive, there is no good reason why plaintiff should be allowed to proceed further with his or her case.

Although it is true that allowing further discovery could theoretically yield evidence helpful to plaintiff's case, that is true in virtually all cases. The goals of qualified immunity would surely be defeated if plaintiffs could go on "fishing expeditions" to bolster cases that are too weak to convince a judge that the plaintiff actually has a case. Allowing a plaintiff severely to burden government officials with discovery simply because he or she has come up with *some* evidence, though not enough to convince a judge, that defendant acted with the improper motive, raises problems similar to those discussed earlier with respect to circumstantial evidence. It is just too easy for a plaintiff to come up with "some" evidence from which one can infer an actor's improper intent. A fair balance, therefore, between the goals protected by qualified immunity on the one hand, and vindication of a plaintiff's constitutional or statutory rights on the other, can be achieved by employment of this standard.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that the decision of the United States Court of Appeals for the District of Columbia Circuit be affirmed. In order to avoid evisceration of the *Harlow* interests, at a very minimum, a heightened pleading standard requiring that plaintiff allege or prove specific nonconclusory facts establishing improper motive must be imposed. And whether or not this Court ultimately requires that plaintiff put forth direct, rather than circumstantial, evidence of improper motive, it should at the very least require that plaintiff's evidence of improper motive rise to a certain level of substantiality – at a minimum, the evidence must lead the judge to conclude that the defendant acted with the improper motive – before governmental officials are subjected to the harms that attend discovery and trial.

Dated: Honolulu, Hawaii, March 29, 1995.

Respectfully submitted,

MARGERY S. BRONSTER
Attorney General
State of Hawaii

GIRARD D. LAU*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus
Curiae State of Hawaii

[Other Counsel of Record
Listed on Inside Cover]